

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

MARK HALE, ET AL.,)
)
Plaintiff,)
)
vs.) No. 12-cv-00660-DRH-SCW
)
STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY,)
) status conference
Defendants.)

TRANSCRIPT OF PROCEEDINGS
IN-COURT HEARING
BEFORE THE HONORABLE STEPHEN C. WILLIAMS
UNITED STATES MAGISTRATE JUDGE

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1 **(Court convened)**

2 COURTROOM DEPUTY: Case Mark Hale vs. State Farm
3 Mutual Automobile Insurance Company, et al., Case
4 No. 12-660. Will the parties please get their name in the
5 record.

6 MR. CLIFFORD: Robert Clifford, Steven Blonder, and
7 George Bellas on behalf of the plaintiffs. Good afternoon,
8 Your Honor.

9 THE COURT: Good afternoon.

10 MR. SAFER: Good afternoon, Your Honor. Ron Safer,
11 Joe Cancila, and Patrick Cloud on behalf of State Farm.

12 THE COURT: Good afternoon.

13 MR. SCOTT: Russell Scott and Andrew Tessman on
14 behalf of defendant William Shepherd.

15 THE COURT: Good afternoon. And Mr. Lucco?

16 MR. LUCCO: Good afternoon, Your Honor. Bill Lucco
17 on behalf of Korein Tillery and associated lawyers.

18 THE COURT: Okay. All right. So we're here for a
19 hearing on issues raised in filings related to privilege.
20 We've got the competing briefs that were filed by the
21 Korein Tillery group and defendants, and then also
22 plaintiffs and defendants.

23 So what we're going to do is this: I'm going to
24 give State Farm 30 minutes to address the Korein Tillery
25 Group's assertions; then, Mr. Lucco, I'm going to give you

1 45 minutes to respond if you wish, if you want to take that
2 long; and then State Farm, you get another 15 minutes, or
3 other defendants, however you want to break that up.

4 Then we're going to go into the assertions between
5 plaintiffs and defendants. Plaintiffs get 30 minutes;
6 State Farm, you get 45; and then plaintiffs, you get another
7 15. In between those two we're going to take a break. So
8 that should get us through most of the afternoon. I'll have
9 some questions, but let's go ahead and get started.

10 MR. CANCILA: Good afternoon, Your Honor.
11 Joe Cancila for State Farm.

12 Your Honor, State Farm has moved to overrule the
13 Tillery Group's objections to the Wojcieszak and
14 Denton/Tactical Investigations documents. There are 413
15 documents at issue in respect to those privilege assertions
16 spanning some 31 pages. It's Exhibit 8 to our opening brief
17 on the issue, Your Honor. I believe Your Honor has already
18 had those documents for in camera review, so --

19 THE COURT: I have them. I can tell you, I've only
20 scratched the surface. I've got reasons for not having gone
21 all the way into them, but, yes, I do have them. They
22 provided all of them to me.

23 MR. CANCILA: Okay. So the privilege assertions
24 break down into three categories. There's roughly 88, 90
25 work product assertions. There's 300-plus on the First

1 Amendment nature and a handful or so of attorney-client
2 assertions.

3 We want to establish at the outset how demonstrably
4 relevant and central to State Farm's defenses these
5 Wojcieszak and Denton/Tactical Investigation documents are.
6 So Doug Wojcieszak is a key witness in this matter. He
7 provided three affidavits to plaintiffs in 2005 and 2011 in
8 the Avery litigation where he made various factual
9 assertions about State Farm's role, or alleged role, in the
10 Karmeier campaign and State Farm's alleged indirect
11 contributions to the Karmeier campaign.

12 Tactical Investigations is his firm, or the firm
13 that he was formerly associated with. Tom Denton is his
14 partner. So when you're seeing the Bates stamp numbers, the
15 Denton Bates stamp numbers come from Tactical Investigation
16 possessed documents; Wojcieszak documents come from
17 Mr. Wojcieszak. Those documents concern, among other
18 things, the Karmeier/Maag race, the financing of the
19 Karmeier campaign, the Karmeier campaign management about
20 which there's been myriad allegations made by plaintiffs as
21 to who truly was in charge of that campaign, supposedly.
22 There's documents attributing the indirect contributions
23 that were made to various entities, although in respect to
24 the documents possessed by Wojcieszak and Denton, for which
25 the Tillery Group asserted privileges, those attributions

1 are pointed to Philip Morris, or Big Tobacco, and not to
2 State Farm.

3 So there are documents that relate to ICJL,
4 JUSTPAC, ATRA, the Chamber, and who -- Illinois Chamber, the
5 U.S. Chamber, who supposedly was behind all of those
6 contributions that those groups made. We expect that what
7 these documents will reveal -- and we've gotten smidgens of
8 that already from the documents that had been produced,
9 never mind the ones that have been withheld -- are that
10 Mr. Wojcieszak and Mr. Denton and Tactical Investigations
11 attributed all the corporate contributions that they said in
12 Avery and that plaintiffs have said here and in Avery that
13 State Farm was responsible for. They attribute those to
14 Philip Morris.

15 They have created these demonstrative charts.
16 They're elaborate charts showing, you know, the connections,
17 the interconnections, all leading between, you know --
18 either State Farm is the version of it that was filed in
19 Avery, or Philip Morris is a version of it that was supplied
20 to the Tillery Group -- and they're basically
21 fill-in-the-blank demonstrative exhibits. You know, just
22 replace State Farm by Philip Morris and you have essentially
23 the same thing.

24 Indeed, in addressing a recusal motion in the *Price*
25 case just last month, you know, Justice Karmeier recognized

1 the remarkable similarity in the allegations and the
2 supposed proofs that had been submitted to justify his
3 requested recusal, only in one instance -- again, in *Price*,
4 Philip Morris; in the Hale case, State Farm -- supposedly
5 behind everything.

6 The documents also show and refute plaintiffs'
7 allegations about the Karmeier campaign management, you
8 know, and you see those assertions even made in the
9 plaintiffs' brief, which we'll get to later, in terms of
10 supposedly Mr. Murnane ran everything. Well, if you look at
11 the documents that we've seen that were provided to the
12 Tillery Group, you see that those documents suggest that it
13 wasn't Mr. Murnane; it was Steve Tomaszewski that ran the
14 campaign and that was announced to be the campaign manager.
15 And you see it both in documents that attempt to smear
16 Mr. Tomaszewski as well as in documents where Wojcieszak
17 gives a sworn statement to plaintiffs' attorneys here where
18 he indicates Tomaszewski ran the campaign.

19 THE COURT: Isn't it the case that at least there's
20 some evidence that Mr. Murnane was the de facto campaign
21 manager before Mr. Tomaszewski took over and that
22 Mr. Murnane considered himself to be the de facto campaign
23 manager?

24 MR. CANCELA: We've seen one document that has been
25 produced where there was that short-term characterization

1 made in the document.

2 THE COURT: That's what I'm talking about, is
3 there's -- the assertion is, *I've been the de facto campaign*
4 *manager*, or -- that's the phrase used, "de facto campaign
5 manager" -- *and we need to get someone on the ground*, and
6 then once that person is on the ground, that being
7 Mr. Tomaszewski, then that role ends as de facto campaign
8 manager when he takes over.

9 MR. CANCELA: And as I acknowledge, there is such a
10 document that we've seen in the production in this case as
11 to an interim self-assessment apparently by Mr. Murnane in
12 that respect.

13 THE COURT: Yeah.

14 MR. CANCELA: Nothing linking that self-assessment
15 to anything State Farm knew or was aware of or
16 what-have-you. We saw it the same time plaintiffs did when
17 it was produced in this litigation.

18 THE COURT: Well, that was my question.

19 MR. CANCELA: Right, right.

20 THE COURT: That particular e-mail you had not seen
21 until this case?

22 MR. CANCELA: Correct. That is correct.

23 THE COURT: Okay.

24 MR. CANCELA: Besides the relevance to these --

25 THE COURT: And you assert -- I'm sorry. Are you

1 asserting that State Farm also had never seen that e-mail?
2 I know you haven't. Can you also affirmatively state
3 whether or not State Farm had ever seen that e-mail from
4 Mr. Murnane prior to this litigation commencing?

5 *MR. CANCILA:* Okay. So I am unaware of anyone from
6 State Farm ever having seen that e-mail before this lawsuit
7 commenced, Your Honor.

8 *THE COURT:* Okay. Well, that answered my question.
9 Thank you.

10 *MR. CANCILA:* Besides the relevance to these key
11 considerations relative to who ran the campaign, who funded
12 the campaign, who do you attribute these indirect
13 contributions to, all of this information from the
14 Wojcieszak and Denton documents, and presumably from those
15 that have been withheld as well -- because they're even in
16 the non-withheld ones -- also goes to Wojcieszak's
17 credibility as a witness. He's been listed as a fact
18 witness in their Rule 26(a)(1) disclosures, and it
19 illustrates a great deal about what plaintiffs themselves
20 didn't say about Wojcieszak when they filed his affidavits
21 in 2005 and 2011.

22 There was -- this information that I've just
23 reviewed in terms of the competitive world view, the
24 diametrically different world view that Wojcieszak and
25 Denton had taken, none of that was mentioned in the 2005 or

1 2011 pleadings that plaintiffs filed in Avery. So in terms
2 of the notion about what there's an affirmative obligation
3 to disclose, plaintiffs apparently felt no affirmative
4 obligation to disclose any such information themselves in
5 their own filings.

6 *THE COURT:* Well, we're focusing on
7 Korein Tillery's.

8 *MR. CANCILA:* I appreciate that. I'm about to move
9 on.

10 *THE COURT:* Because that's the time you're allotted
11 right now, just so you're aware.

12 *MR. CANCILA:* All righty.

13 Here's why the Tillery Group is not entitled to the
14 work product privileges they assert: Right from the outset
15 the Rule 26(b)(3) doesn't even apply to the Tillery Group.
16 26(b)(3) applies to work product prepared in anticipation of
17 the litigation by a party or an agent of the party, so the
18 precise language of Rule 26(b)(3) does not even extend to
19 plaintiffs. And there's two Northern District cases --

20 *THE COURT:* All right. So in *Appleton* papers,
21 Seventh Circuit case binding on this Court, there was a
22 request via Freedom of Information Act, nonparty, totally
23 outside the scope of litigation, and the Seventh Circuit
24 says you apply Rule 26 and you apply the work product -- all
25 of those rules, and so if it's excepted from relevance under

1 those circumstances, Work Product Doctrine applies.

2 How's that not binding and how does that not answer
3 this particular question? Doesn't answer all the questions,
4 but the question of whether or not you can assert work
5 product now just because you're not actually a party to the
6 litigation when you got work product together for some other
7 piece of litigation, it seems to answer that question
8 directly, and the answer is: It applies. Doesn't go away
9 just because your litigation is over, making it free for
10 everyone else to see.

11 For example, let's say Mr. Tillery some day down
12 the road files his own lawsuit here in federal court. I
13 don't know if that's going to happen. Let's speculate for
14 awhile. And he says, *I want every bit of work product from*
15 *defense counsel's firm in State Farm.* Does work product not
16 apply now if he were to do that? I can't imagine you would
17 think that it would. It's hard for me to imagine saying it
18 would.

19 MR. CANCELA: Okay. So in terms of *Appleton*, if
20 I'm not mistaken -- I've read a number of cases here
21 recently. I believe *Appleton* was a FOIA dispute and a FOIA
22 lawsuit where the party seeking the -- where the party
23 seeking the documents brought a FOIA lawsuit to pursue.

24 THE COURT: Right, yes.

25 MR. CANCELA: And it was government-related, you

1 know, documents that were withheld. So I'm stretching my
2 recall of the case now. So I thought it was an inapt case.
3 I thought we distinguished that in our cases. And we had
4 identified both a 2010 and 2012, or 2008 and 2012 Northern
5 District of Illinois cases that were explicit on that
6 proposition.

7 *THE COURT:* This is a Seventh Circuit case. It's
8 fairly explicit.

9 *MR. CANCELA:* I'll look at it in my 15-minute
10 return.

11 Moving on to a second topic. The notion that these
12 investigative materials are protected, you know, there's the
13 basic Seventh Circuit law on no private investigator
14 privilege, that NCAA decision. So there's not an
15 entitlement to insulating this material simply because it
16 was undertaken by an investigator.

17 *THE COURT:* Right, but there's also -- it doesn't
18 just go away because it's an investigator also. If the
19 investigator's employed by a lawyer, it's there, as long as
20 it otherwise meets the requirements for work product. Isn't
21 that just plain as day also? I mean, again, in the *Appleton*
22 case, United States retained Amendola and other firms in
23 preparation for Fox River and other litigation. They
24 retained an engineering firm -- they weren't lawyers -- and
25 they compiled reports, work product. They were hired by the

1 law firm. I mean -- and here, this is only some threshold
2 questions we're dealing with here, but I mean these are kind
3 of some basic principles. If you hire an investigator as a
4 lawyer to work on your case, doesn't it apply under most
5 circumstances?

6 MR. CANCILA: It depends what the work is that the
7 factual investigator is doing. It depends whether the
8 factual investigator's work reflects the mental impressions
9 of the attorneys.

10 THE COURT: No, it doesn't have anything to do with
11 that initially. I mean that gets special protection, but
12 whether or not the, quote, unquote, "fact work product" as a
13 matter of -- if you look at it and you say, *Is this work*
14 *product or not*, you don't get into the analysis of mental
15 impressions. We don't want you to piggyback on someone
16 else's work. That's what it's there for as far as I can
17 tell. Again, the *Appleton* case also seems to make that
18 patently clear.

19 MR. CANCILA: I'll return to the *Appleton* case.

20 THE COURT: Sure.

21 MR. CANCILA: A third proposition that we wanted to
22 mention is, much of this is simply public relations work and
23 nothing more than public relations work. That's the way
24 it's characterized in the agreement that Korein Tillery had
25 with Tactical Investigations. That's how Wojcieszak

1 described the principal work that he was performing for
2 Korein Tillery and other lawyers: Public relations work.
3 That's recited in the excerpted portion of the sworn
4 statement transcript we submitted, Your Honor, and it's also
5 covered in the exhibit that the Tillery Group submitted as
6 well.

7 THE COURT: The log?

8 MR. CANCILA: The -- I'm sorry. The law?

9 THE COURT: Are you saying it's also reflected at
10 certain entries in the privilege log itself?

11 MR. CANCILA: Yes, yes, yes.

12 THE COURT: Got you. And public relations work is
13 not work product.

14 MR. CANCILA: Is not work product, correct. And
15 so, you know -- there's the *Burke vs. Lakin Law Firm* case
16 here in the Southern District which addresses that very
17 issue, and the kind of public relations consequences of
18 pending litigation doesn't insulate that material from, you
19 know, work product protection. I think that's the
20 proposition that was established in the *Burke* case that
21 we've cited.

22 The fourth proposition is that this material was
23 freely shared with the plaintiffs' attorneys here. So one
24 of the first entries that appears on the log itself
25 reflects -- on the Tillery log itself reflects not only

1 Korein Tillery but also reflects Robert Clifford as a
2 recipient of the information. Now, plaintiffs have cited
3 law for the proposition, but, well, they're not an
4 adversary, you know. But that's not the standard, whether
5 they're an adversary; it's whether or not the sharing of
6 that information makes it substantially more likely that
7 it's going to be made available, you know, to an opposing
8 party. So that's the standard. And so --

9 *THE COURT:* Do you think that under these
10 circumstances that we're discussing here today that you've
11 met that standard?

12 *MR. CANCELA:* I believe so. I believe so, both
13 because --

14 *THE COURT:* We're fighting tooth and nail about
15 reviewing these documents. Nobody's giving them up
16 voluntarily.

17 *MR. CANCELA:* They're not, but I believe they have
18 waived that as a consequence of what they've done. Now, to
19 be sure, they're not, you know, adversaries in the sense
20 that they're both, you know, plaintiff trial lawyers, and
21 capable trial lawyers to be sure, but they're taking
22 diametrically inconsistent positions in their respective
23 litigation as to who was responsible for the expenditures
24 that were made by various trade associations. Who was
25 responsible for supposed indirect contributions and the

1 like? Who supposedly controlled various trade
2 organizations? So there is adversity in their positions in
3 that regard.

4 The other thing that hasn't happened here is
5 there's been no showing that the holders of the documents,
6 Wojcieszak and Denton, maintain that information as
7 confidential. You know, they haven't made any showing that
8 it wasn't shared more broadly than that. And in fact, we
9 indicated, you know, in our argument, in identifying some of
10 the disclosures were made, that it went more broadly than
11 just to plaintiffs' counsel. It went more broadly to other
12 folks as well. There's documents out there where Wojcieszak
13 and Denton are talking about writing a book about all of
14 this material.

15 So I want to leave work product and go to First
16 Amendment. On the First Amendment front we know from the
17 outset it's a qualified privilege. It's clearly not
18 absolute. We don't think that Tillery Group has made the
19 showing that would be required here to support a First
20 Amendment assertion. They haven't described the nature of
21 any association that is asserting this First Amendment
22 privilege. They haven't identified kind of the core --

23 *THE COURT:* I want to back you up for just a second
24 because there was -- I wanted to ask you this question on
25 work product: So if they share a document, your contention

1 seems to be they've shared it all and that waives the
2 privilege as to everything, and that's -- let's assume that
3 we get past -- you're not sharing with an adversary but
4 you're sharing it with someone else. They may not be an
5 adversary but it's freely enough shared that you've waived
6 the privilege as to that particular document. And they're
7 telling me that, as to work product, *We're not holding on to*
8 *those things*. Maybe on the First Amendment issues we are,
9 but as to work product, no.

10 MR. CANCELILA: *We're not holding on to those things.*
11 I'm not sure I follow.

12 THE COURT: We're not holding on to documents that
13 were shared with Mr. Clifford, for instance.

14 MR. CANCELILA: Well, we're at a disadvantage since
15 we don't know what has been held on. I mean we've seen the
16 advocate statements made in the briefs. But one of the
17 first log entries that's reflected on the Tillery log has
18 Mr. Clifford's name on it as a recipient, so that seems to
19 run counter to that assertion. Have no idea, you know, what
20 the magnitude of that sharing was.

21 And you, obviously, Your Honor, would be in a
22 better position, from an in camera review, to assess whether
23 the subject matter contained on some of those documents that
24 were shared spanned over to these other documents. We're
25 not really in a position to see that on the strength of the

1 law. We're not taking the position that, Katy-bar-the-door,
2 if you give one document to Mr. Clifford, that means you can
3 never claim any privilege assertion again. It's basically a
4 subject matter related --

5 *THE COURT:* Is it the same? Is it as broad as
6 subject matter waiver, just like with attorney-client
7 privilege, or is it different than that with work product?
8 Do you waive all claims of privilege to any subject matter
9 that's related to the work product document that you have
10 voluntarily as well as all other documents that are your
11 work product that relate to that subject matter?

12 *MR. CANCELA:* I think it would come to what the
13 definition of the subject matter is that's involved there.
14 That's my understanding, that it is a subject matter-driven
15 waiver and not simply a document-specific waiver. If they
16 turned over documents to Mr. Clifford that, you know,
17 reflected the views relative to Wojcieszak and Denton's view
18 as to Philip Morris being behind contributions, I would
19 assume that that would waive as to any other Philip Morris
20 related, you know, documents, for example.

21 *THE COURT:* Yeah. So I think it's five -- 502 has
22 some language in that about that. So the extra requirement
23 that is listed there is, they ought to in fairness be
24 considered together, but that presumes there's a waiver to
25 begin with by disclosing it to Mr. Clifford.

1 MR. CANCILA: Right.

2 THE COURT: Okay. Sorry. I'm done asking
3 questions about that for now.

4 MR. CANCILA: Okay. Going on to First Amendment.
5 As I was mentioning, we don't think they've met their
6 prima facie burden of establishing a core group that, you
7 know, has some type of associational protections to which it
8 would be entitled. We don't think they've made a showing
9 that there'll be any chilling of any variety, of any speech,
10 any contributions or the like, and it's hard to conceive of
11 how there would be, given the dated nature of most of these
12 documents. I mean they're largely ten-year-old documents
13 dealing with the Karmeier/Maag race and the like.

14 On top of that, Your Honor entered a protective
15 order that, you know, was a hard fought, you know, battle as
16 to whether or not First Amendment privileged materials would
17 be deemed confidential, and Your Honor adopted that order,
18 which not only provided that confidential assertions could
19 be made but further provided that there be no waiver
20 subsequently as a result of, you know, the production here.
21 Kind of builds in the protection of the evidentiary rule to
22 which you were just, you know, referring.

23 THE COURT: So their position that was articulated,
24 if I recall this correctly, is just like we said in our
25 affidavits, and citing to -- there's some District Court

1 cases that adopt this approach. We say that we are afraid
2 of retribution and that should be enough. That's their
3 additional evidence from their position that we didn't
4 necessarily talk about when we had our discussion about the
5 protective order previously.

6 *MR. CANCELILA:* Right.

7 *THE COURT:* And so is there something more that's
8 needed in the protective order or otherwise or --

9 *MR. CANCELILA:* I don't think so, especially when
10 it's no secret the nature of the Tillery Group contributions
11 to Justice Maag's campaign. They're reported in the Board
12 of Election records, they're reported in the contributions
13 that were made to the Justice for All PAC, you know, which
14 was substantially, you know, funded by the Tillery Group.
15 So the notion that there's going to be something more beyond
16 retribution when there's a public record of the hundreds of
17 thousands or more in contributions that were made, is just
18 very speculative.

19 *THE COURT:* Well, but you're not interested in how
20 much money they gave them. I mean you're looking for
21 statements and discussions and strategy and things that are
22 going to impact your cross-examination of Wojcieszak and
23 Denton.

24 *MR. CANCELILA:* Absolutely, absolutely. So the
25 notion -- I mean our thought is that they can't make a

1 showing of retribution in view of what's already in the
2 public domain, and plus the dated nature of the documents at
3 issue. You know, we could really care less about the
4 Tillery Group's political involvement in anything. That's
5 not the reason we want the documents. We want the documents
6 to establish the contradictory assertions that Wojcieszak
7 has made, the contradictory world view, the diametrically
8 different world view that he's put forth. And we've seen a
9 lot of that but we haven't seen the withheld documents to
10 know what more there is in that regard. But we've
11 definitely shown that these materials go to the heart of the
12 matter of the defense, you know, that would enable us to
13 overcome the qualified privilege even if they had made a
14 threshold requirement in the first place.

15 *THE COURT:* You're all done?

16 *MR. CANCELA:* Right. Thank you.

17 *THE COURT:* All right. So Mr. Lucco?

18 *MR. LUCCO:* Thank you, Your Honor. May it please
19 the Court, counsel.

20 Because of my familiarity with this courtroom and
21 others, I must say it's a heartwarming sight when I see so
22 many people in here, none of whom have ankle bracelets on.
23 It's encouraging, especially when some are from Chicago,
24 Your Honor. Having said that, I don't think I'll be as
25 long --

1 MR. SAFER: I think the record should reflect that
2 he was looking at Mr. Clifford with regard to the
3 adversarial question, Your Honor.

4 MR. CLIFFORD: That's okay.

5 THE COURT: When he mentioned ankle bracelets.

6 MR. LUCCO: Indeed, I'm honored to be here,
7 Your Honor. Thank you. And I'll try to be as succinct as I
8 often am not.

9 Look, we're asserting essentially two privileges:
10 What I consider the time-honored trial privilege, work
11 product, and even a more sacred First Amendment privilege of
12 right of association and freedom of speech and so forth.
13 And I'm going to get right to the point here because what I
14 heard State Farm argue, what I read them argue, what I heard
15 you in essence refute are, to me, all the side issues that
16 demonstrate the weakness of their position that they cannot
17 establish any -- they cannot meet either of the tests for
18 getting the work product disclosed or overcoming the First
19 Amendment.

20 And let's just think about this for a second. The
21 tests are somewhat similar. In work product, they've got to
22 show a substantial need for the document to prepare their
23 case, and then secondarily, assuming they do that, they've
24 got to --

25 THE COURT: If it wasn't waived.

1 MR. LUCCO: If it wasn't waived, they've got to
2 show without hardship they can't get it by other means. On
3 the First Amendment issue, they've got to show, in so many
4 words, after all comes down to the heightened scrutiny test
5 and the high relevancy and so forth, they've got to show
6 that these documents go to the heart of the matter, they're
7 crucial to the parties' case.

8 And then again, secondarily, they got to show
9 they've exhausted all other ways of getting this in a less
10 chilling manner. And I want to address these first, then
11 I'll come back to all these side issues or answer your
12 questions as I go.

13 THE COURT: Okay. So threshold question: The
14 documents aren't in your possession; they're in the
15 possession of?

16 MR. LUCCO: Our agent.

17 THE COURT: Well, that's my question, is, you've
18 got -- a contractual relationship is one thing that's been
19 asserted that extends the timeframe for which they've agreed
20 not to disclose it for another couple years. But they're
21 not in your possession, and so in terms of -- when we're
22 talking about associations that are engaged in political
23 speech on controversial topics, business associations,
24 political associations on the one hand and their internal
25 communications, which cases seem to deal with versus hiring

1 an investigator to do political work on the other hand,
2 isn't there a distinction there?

3 I mean what we're talking about is, this
4 individual, these individuals are hired not to do just -- I
5 mean there's political work involved but then there's also
6 work that's directly associated with a case. And does it
7 make any difference if, for example, some of the assertions
8 might relate to documents that are both, or, as raised by
9 the defendants, just simply PR? So isn't there something to
10 that notion? They're not your documents, so do you have
11 that same right? If you're an association and you say, *We*
12 *don't want to release our membership list, our internal*
13 *communications*, they're the ones who are making that
14 assertion. I don't know that if you voluntarily made
15 yourself a part of that organization or made communications
16 to that organization, do you have a right to keep those
17 protected as opposed to the organization itself?

18 MR. LUCCO: If we're talking about the First
19 Amendment --

20 THE COURT: That's what we're talking about.

21 MR. LUCCO: I think we have the association here of
22 some professionals with professionals who are lawyers doing
23 political advocacy, in this particular instance having to do
24 with the judiciary. And I think the point is, whether we've
25 held on to those documents or received a copy because it's

1 e-mails going back and forth, and the large large body of
2 these documents not only are First Amendment, as was pointed
3 out by counsel, but they're e-mails. They're communications
4 between these people. And I think that goes to the heart of
5 the problem that's raised in all of these First Amendment
6 cases.

7 This is, in fact, the chilling effect, is whether
8 people are going to participate in any kind of an
9 association who's going to take political positions. I
10 don't even think they have to be controversial, although we
11 see that. And we have the affidavit supplied in this case
12 by each of the members I'm representing, and we saw it in
13 the other cases where people say, *I'm not even going to --*
14 *in essence, I won't go to these meetings, I won't have these*
15 *conversations. I'm not going to sit at my desk and e-mail*
16 *back and forth to my colleagues, my associates, if I think*
17 *these e-mails, because they're in the hands of a sever or*
18 *sender, even within our association, could be subpoenaed,*
19 *and the consent of those e-mails now are in the domain.*

20 THE COURT: If we take just the lawyers who are
21 involved in the advocacy, we're not dealing with those
22 documents, so we're exclusively here dealing with --

23 MR. LUCCO: But we could be.

24 THE COURT: But we're not. And I'm not asking a
25 question that goes to that situation. We've got a group of

1 lawyers involved in political advocacy involving the
2 judiciary. They're also involved in a case. And does it
3 not make any difference at all when the same investigators
4 who you are using to further advance your political
5 advocacy, then also opt to have -- sign affidavits which you
6 submit in support of advocacy, or you're aware that they may
7 do it for someone else, or those individuals choose to do it
8 for someone else. Doesn't that have any impact at all on
9 really what we're characterizing it as, or shouldn't it have
10 any impact at all?

11 MR. LUCCO: I think not, and I don't think it
12 should, Your Honor, quite frankly.

13 This is a small association at the time we're
14 talking about, and we have in it -- it's no different than
15 if we had members and we had an executive director or we had
16 an executive committee that ran things and now those people
17 end up doing other work, although we sit in on the
18 communications, we participate in meetings, we add our 2
19 cents about thoughts in debate, which we want to be able to
20 do freely and without fear of this becoming public, I don't
21 see how it's any different than that.

22 I think we have an unusual situation because people
23 are being used in a work product role and they're being used
24 in a role that is political advocacy. Does that -- I mean
25 they've argued in there that the fact that you combine those

1 has actually watered down the effect of the work product.
2 Somehow that belies its work product if some aspect of this
3 is First Amendment. Well, we did our very best, if *Price*
4 was implicated in the communications, if you will, to call
5 it work product, and if it was not, it was what we called it
6 First Amendment. But there were e-mails and chains where
7 there's both --

8 *THE COURT:* What if it's just advocacy, for
9 example, to change public perception about *Price*? Not
10 advance an agenda as to a particular political candidate,
11 not -- I'm just saying hypothetically, what if there's --

12 *MR. LUCCO:* I don't think it matters a whit,
13 Your Honor.

14 *THE COURT:* What do we call that if the --

15 *MR. LUCCO:* I think we might call it both. I think
16 it's certainly political advocacy, "political" with a small
17 "p". It's political advocacy on any issue. It could be
18 that Clorox has got a bad spelling. It could be anything.
19 I don't think it has to be controversial. Now, let's don't
20 kid ourselves. It's not what we have here. That's not why
21 they want these documents. And these documents, once we
22 start understanding that they are largely e-mails, to me, it
23 raises another layer of questions about, what is the purpose
24 of this?

25 And if I may now, I'm going to say why I think they

1 fail rather dramatically satisfying that this is a
2 substantial need in the work product area or that it goes to
3 the heart of the matter. And let's think. What would be
4 the substantial need to State Farm? And what is so highly
5 relevant that it goes to their case? Work product, First
6 Amendment. Well, they tell us that. I heard a little bit
7 of the nuance to it today, but in their briefs -- they filed
8 a brief, then they filed a reply brief. They make
9 overwhelmingly clear, they want to be able to impeach
10 Mr. Wojcieszak. They can call it, they want to show
11 conflicting world views, they want to show inconsistencies
12 as whether it's State Farm or Philip Morris, but the reality
13 is, they want to impeach Mr. Wojcieszak. They say that on
14 page 2, the very part of their brief. They say on page 1,
15 the very first part of reply. They say it on the last two
16 pages of each, the last page of the brief and the last page
17 of the reply. They go back to the same point that they want
18 to show the contradictory statements about the source of the
19 contributions, and then they just make kind of the assertion
20 that they need this highly relevant information and it far
21 outweighs our First Amendment interest.

22 They then go on to say, and it was reiterated
23 today, look, the focus here, Your Honor, they say in their
24 brief, is not on the Tillery Group political activities but
25 how these documents will undermine Wojcieszak and the Hale

1 allegations that State Farm is a source of the money. This,
2 as I understand it, is a racketeering case, something I know
3 a little bit about. And as I understand, the predicate acts
4 are mail fraud. And as I understand it, the mail fraud is
5 rather simple, as we all know: A scheme to defraud. You
6 intended to do so and you used the mails.

7 So we're talking about a scheme to defraud. How
8 does the impeachment of Mr. Wojcieszak go to that scheme to
9 defraud? Mr. Wojcieszak is not going to be a witness as to
10 how much money State Farm gave or didn't give or who they
11 gave it to. They said in the Hale brief, Your Honor, that
12 they really are not intending to use him, that they used him
13 as context to explain things in the complaint. They listed
14 him as a potential witness. Okay. If he's a witness, it's
15 another matter to impeach him, but I'm going to tell you
16 they then failed to satisfy the second prong that they can't
17 get this information elsewhere.

18 They have tons of information. They've recited the
19 various documents they have. One shows a world view of
20 Philip Morris, one shows a world view of State Farm. They
21 have all of these documents to impeach Mr. Wojcieszak with.
22 They've said so on page 19 of their brief. They've attached
23 three exhibits: 17, 16, and 12, that they already have to
24 render Mr. Wojcieszak an incredible witness. So they don't
25 need it, they have it, and it doesn't go to the heart of

1 their case. It does not go to a scheme to defraud.

2 Now, they then roll in, in the reply -- I think
3 it's in the reply -- that they may need it for the defense
4 of limitations and what these counsel knew and when they
5 knew it. Okay. That's -- I don't have any interest in
6 that, I must tell you, but it's my understanding that
7 Judge Herndon has ruled on that, that that limitation's
8 defense is off. That it was triggered by the second
9 predicate act, which is 2011. That's my recollection.

10 *THE COURT:* They assert that you've also got an
11 assertion of a tolling, that equitable tolling that is based
12 on what plaintiffs' knowledge is in their case. They're
13 saying that's plaintiffs' counsel, and, as a consequence,
14 their investigators knew what they knew is relevant to that.
15 That's an argument they made, not us. And while true
16 enough, you've still got the second predicate act in 2011.
17 Case was filed in 2012. But they're both discussed, I
18 believe.

19 *MR. LUCCO:* They are. And I think -- so my
20 position on this, Your Honor, is, neither that limitation's
21 point or the impeachment point, which are all that are cited
22 in these briefs for the reason in these documents, shows
23 substantial need or go to the heart of the matter.

24 I know the weight to be given District Court cases,
25 but sometimes you see one that the language is so good that

1 it has to be read. I'm going to quote, Your Honor -- it's a
2 case actually cited by the plaintiffs called *1100 West vs.*
3 *Red Spot Paint*, and in that case the court quotes from
4 another case, *McPeck vs. Ashcroft*, and *McPeck* [ph.] says as
5 follows:

6 *If the desire to impeach a witness with a prior*
7 *inconsistent statement is a sufficient showing of*
8 *substantial need, the work product privilege would*
9 *cease to exist. There is not a lawyer born who would*
10 *not like to see opposing counsel's files in order to*
11 *search for inconsistencies in opposing witnesses'*
12 *potential testimony.*

13 To me, that does say it all, and it's because I
14 believe they have failed to show the substantial need and
15 it's because they fail to save these documents that can lead
16 to the heart of their case that they start grasping at the
17 things Your Honor has now already debunked, which I made my
18 own list of these things: They're a non-party; the
19 investigator doesn't have a privilege; they went so far as
20 to say you cannot protect facts, only opinions. He makes
21 comments about the mental impressions.

22 And by the way, all of that is dealt with in
23 *Appleton*. This point, particularly in *Appleton*, caught my
24 eye because this point had been raised by them. It wasn't
25 mentioned today, but they're entitled to get to the facts

1 that are not the mental impressions -- legal theories.

2 That's not true. The Seventh Circuit, in *Appleton*, plainly
3 says the facts are protected. As you commented, if it goes
4 to the mental impressions, it's got another layer of
5 protection.

6 *THE COURT:* Right. You can waive facts, not mental
7 impressions.

8 *MR. LUCCO:* Now, as to these documents that he
9 mentions that are on the privilege log or referenced by
10 being sent and shared --

11 *THE COURT:* I should restate that. You can show a
12 substantial need for facts, not mental impressions. You can
13 waive those. Sorry. Go ahead. I don't want that to be
14 uncorrected.

15 *MR. LUCCO:* As to the documents that were shared,
16 we have an affidavit that we didn't authorize them to share
17 anything -- that was our communications, our work product or
18 anything of our First Amendment. But it is our
19 understanding it's been alleged in the case -- I have no
20 reason to know whether it's true or not true, but that there
21 were documents recovered from a trash receptacle of some
22 sort and that those documents may have been sent or were
23 sent, may have been sent to plaintiffs' counsel. We are not
24 asserting any work product or First Amendment privilege on
25 those documents. They're not on our log.

1 THE COURT: What about the ones that are on the log
2 that went to Mr. -- obviously those you are asserting. So
3 you're acknowledging, you're making assertions as to some
4 documents or communications?

5 MR. LUCCO: Absolutely. As to the communications,
6 absolutely. And they argue we didn't make the prima facie
7 showing. Well, all those cases that are in our brief, and,
8 of course, *City of Greenville* and *Syngenta* is a nearby one,
9 we satisfy those declarations by what the associates here
10 have said. And I think really that it is the free
11 discussion and the negating of that exchange of ideas that
12 is the greatest victim of this kind of chilling effect.

13 Now, they also want to say, and they did say again
14 here today, that somehow what's our complaint when it's
15 publicly known that these various associates opposed a
16 particular candidate and supported another one? Well, I
17 think that's quite beside the point. In fact, I think it's
18 completely beside the point. I can put a yard -- a sign in
19 my yard says, as big as I want, who I'm for, and everybody
20 in the world that wants to drive by there in a public place
21 can see it. I can make contributions, and the election laws
22 and so forth cover how that gets disclosed and who can see
23 that. That, we all know -- not I think any informed citizen
24 understands -- that is a world away from thinking what my
25 friend and I or the six of us sit around my table at night

1 having a coffee and start talking about how we want to
2 support the guy whose name's on the sign and how we want to
3 oppose the guy who we're against and what we think of them
4 and what we think of their mothers and what they think of
5 their kids, that's a whole 'nother matter.

6 And they want to get into the private
7 communications of these people who are doing nothing but
8 what a citizen is obliged, at least has the opportunity and
9 they should take it, to do: Associate freely, exchange and
10 debate matters of government importance, and think when you
11 do that among your associates, that you're not submitting to
12 a public body, the government, like NAACP in Alabama or
13 submitting to a corporate entity, some of which are larger
14 than government. And that's what they want to do, and they
15 do not have a substantial need for it. It doesn't go to the
16 heart of their case. They've got it elsewhere. This is
17 just an exercise in, I believe, trying to do just what we're
18 trying to not let them do, crush people into not doing this
19 no matter how much money they might give to a campaign.

20 That's a whole lot different than getting into our
21 communications we sent back and forth one way or another.

22 So Judge, I think they have failed to meet either
23 of the two tests for either of the claimed privileges, and
24 it's why I think they go through this laundry list of other
25 matters here, because they can't get there.

1 THE COURT: I want to go back to the -- how do you
2 distinguish advocacy on behalf of a particular issue that
3 may relate directly to a case from PR, or do we need to --
4 should PR also be covered?

5 MR. LUCCO: I think it should be. I mean you asked
6 me that question, so yes, I think it should be. I don't
7 think there is -- I mean what we characterize in preparation
8 for a trial, I mean what we go through to protect a case for
9 trial has so many facets to it. It's not just researching
10 the law and interviewing witnesses. And there are a lot of
11 things that go into the PR aspect of how a witness is on the
12 stand, what they wear.

13 THE COURT: What about an at by?

14 MR. LUCCO: An at by.

15 THE COURT: At some point --

16 MR. LUCCO: So you asked me, do I think PR should
17 be under that umbrella? I do. In fact, it makes no sense
18 to me that anyone thinks it isn't.

19 THE COURT: So I mean at some point to say your
20 freedom of association and the privilege that attaches to
21 that, how far does that go? I mean how big is that umbrella
22 in terms of communications?

23 MR. LUCCO: Well --

24 THE COURT: Must have some limits; otherwise, you
25 could say everything I do is a freedom of association,

1 everything I say, every person I meet with, because it's
2 important to me, it's an issue, I'm an association of one.

3 MR. LUCCO: Well, I guess I'm going to cop out and
4 answer it this way: I don't think that what we're asserting
5 here stretches those limits at all. I think these are kind
6 of textbook work product sphere and First Amendment sphere.
7 I think they overlap a bit because of the nature of the case
8 and the nature of the politics, and I think they overlap a
9 bit because some of the people are involved in both the work
10 product aspect of it and the political association aspect of
11 it. I think that muddies it a little bit. It doesn't make
12 it as clear to just say, how are we going to deal with this?
13 But I don't think it weakens either position, or should
14 cause the Court to not protect those privileges.

15 And I was just assisted here. I'm glad because I
16 skipped over it earlier. I think there's also the limit of,
17 is there a realistic fear of reprisal? That's what the
18 cases say. Now, we have submitted affidavits that support
19 that, make the prima facie showing of that. We could
20 certainly imagine circumstances where that would not be the
21 case, so I think the fact that the cases put that as an
22 element --

23 THE COURT: So that's --

24 MR. LUCCO: Is perhaps a limiting aspect when you
25 say, is this just going to --

1 THE COURT: So the showing that we're talking about
2 as described by the Seventh Circuit, for instance, and I'm
3 talking about this *Marisi* [ph.] case that's quite -- saying
4 if it were engaged in controversial views and the exposure
5 or publication of its internal files would expose members to
6 retaliation, then it would not have an absolute, but the
7 parties then would have the burden of coming forth with
8 information that -- or, rather, of showing the information,
9 so it was essential to the case.

10 So obviously the Seventh Circuit hasn't refined
11 that, but when we're talking about that issue, and this was
12 spoken to by State Farm, what is really realistic? I mean
13 at what point, when we're talking about information here
14 that's over ten years old, there's -- yes, there's an
15 agreement in place that evidently expires in 2016, which
16 isn't that far off. Isn't there room here for some sort of
17 a protective order that would allow for the dissemination to
18 parties in the case, or is there one for that? And maybe it
19 requires something more than what's currently in the
20 existing protective order, but is there room for that?
21 Because the parties in the case, for instance -- no one in
22 the judiciary that's actually in the case. Justice Karmeier
23 is, like yourselves, responding to a subpoena. He
24 wouldn't -- he's not -- if I order any of this, he doesn't
25 get it. It's the defendants, the plaintiffs. You

1 understand what I'm saying? And so the fear of reprisal,
2 where is it coming from at this point?

3 MR. LUCCO: Okay. Let me address that, if I may.
4 And maybe it's unique to lawyers. Maybe it's unique that
5 this is an association of lawyers.

6 THE COURT: By the way, I'm not suggesting that
7 Justice Karmeier -- that they have a basis for that or not.
8 They're saying they got a fear of reprisal. I'm just
9 speculating as to --

10 MR. LUCCO: I understand. You have clients whose
11 interests you have to look out for when you represent them,
12 when you advocate for them, and this not only affects a
13 judge in a pending matter, but it could affect attitudes of
14 judges in matters completely unrelated to State Farm or
15 unrelated to *Price*. If personal -- not contributions, not
16 whose yard sign you put in your yard, but what you say about
17 people in the privacy of your association, that could have a
18 very chilling effect on your ability to represent clients,
19 on clients being referred to you, on your ongoing business,
20 quite frankly. That may be unique to lawyers in this kind
21 of a circumstance that we have, but I think it's real.

22 I think their motion to overrule should be denied,
23 Your Honor.

24 THE COURT: Thank you.

25 MR. LUCCO: Thank you.

1 THE COURT: Okay. Back to State Farm.

2 MR. CANCILA: Your Honor, I have taken a quick look
3 at *Appleton*, and I think the reason it hadn't stuck in my
4 mind is because I did think it was inapt when I read it and
5 I thought it was inapt because it was a FOIA action. It
6 wasn't a nonparty asserting work product protection; it was
7 the government asserting work product protection itself in a
8 FOIA proceeding. So that, I think, is a material
9 distinction relative to engineering reports it had
10 previously used in other enforcement proceedings, and it
11 asserted the same work product protection again. And
12 then --

13 THE COURT: But why is it materially different? I
14 mean you can say -- I mean the FOIA request is like a
15 third-party subpoena. That's the route you've taken. It's
16 not the same case. In fact, the Seventh Circuit makes that
17 point explicitly. It's not the same case. And in fact, I
18 think they say somewhere in here, they might want to use
19 this information in another litigation going forward.
20 They're applying Rule 26. Statutorily they're supposed to
21 apply Rule 26, so they apply Rule 26, so why isn't the exact
22 same analysis?

23 MR. CANCILA: Because the government's a party in
24 this proceeding. The government is not a party -- I'm
25 sorry, the Tillery Group is not a party in this proceeding.

1 The government is a party in the *Appleton vs. Environmental*
2 *Protection Agency* matter. The government is asserting work
3 product protection as to its own work product.

4 *THE COURT:* So maybe -- so only the government gets
5 to discover work product on an ongoing basis; everybody else
6 is stuck? With State Farm, for instance, if they want
7 State Farm's documents as to the Hale case, can
8 Tillery Group get that?

9 *MR. CANCILA:* No.

10 *THE COURT:* In *Price*?

11 *MR. CANCILA:* I'm not suggesting that.

12 *THE COURT:* Can Hale get State Farm's documents
13 that you're utilizing in the defense of the price matter?

14 *MR. CANCILA:* I'm not suggesting that.

15 *THE COURT:* I'm sorry. Could they get
16 Philip Morris's documents?

17 *MR. CANCILA:* I'm not suggesting that. The
18 distinction is, the government was a party in the matter in
19 which the work product was asserted. That is, the issue is
20 that it was a party, not that it was the government. So the
21 distinction I was drawing previously was 26(b)(3)
22 specifically extends to parties, you know.

23 *THE COURT:* Yeah, but the -- what we're talking
24 about is assertions by lawyers. They're the ones who have
25 the work product privilege to assert, and those lawyers --

1 I'm not talking about their First Amendment arguments; we're
2 just talking about work product. Those are the lawyers in
3 *Price*. They're parties.

4 MR. CANCELA: And we're not trying to free ride on
5 their mental impressions in respect to their prosecution of
6 the *Price* action. That's what the work product privilege is
7 intended to, you know, protect against. You know, we're
8 looking to try to obtain material that doesn't come within
9 the explicit wording of Rule 26(b)(3) because they're not
10 parties, and we've cited cases that go to that very
11 proposition. I don't believe the *Appleton* case is different
12 than that since the government's work product is what was
13 being sought to be protected, and the government was a party
14 in the litigation itself. That's the only distinction I'm
15 drawing. One of the elements of 26(b)(3) --

16 THE COURT: That litigation, FOIA litigation, its
17 sole purpose was for the acquisition of a document. Let's
18 say that Korein Tillery was not in this district and you had
19 to file a lawsuit and go get the subpoena somewhere else,
20 and it was being decided by a different judge. Does that
21 change it under those circumstances?

22 Now you've got a lawsuit that's open solely for the
23 purpose of enforcement of a subpoena, just like a FOIA
24 request. It's *State Farm vs. the Tillery Group*. Now it's
25 analogous, direct -- I just don't see the distinction. They

1 were a party. These folks are parties by virtue of the fact
2 that they're the lawyers. It's the lawyers for the
3 government that are asserting this. It's as to their
4 investigators.

5 MR. CANCILA: It's the government asserting the
6 work product protection.

7 THE COURT: Sure.

8 MR. CANCILA: It's not the lawyers asserting it;
9 it's the government asserting its interest as a party on the
10 work product of its lawyers.

11 THE COURT: That's true. But is that a distinction
12 without a difference I guess is the question?

13 MR. CANCILA: Okay. And then you had asked the
14 earlier question on 502 as well. I think you had answered
15 that yourself in terms of looking at the language, and the
16 issue of waiver occurs when the disclosure is intentional.
17 The disclosed material concerns the same subject matter in
18 fairness requires. So it's not the same document. I mean
19 it's the same subject matter and it's just kind of a
20 question of how that --

21 THE COURT: But it's not automatic.

22 MR. CANCILA: No.

23 THE COURT: Even if it's the same subject matter?

24 MR. CANCILA: I'm not suggesting it is automatic.

25 THE COURT: There's that extra requirement,

1 fairness.

2 MR. CANCELILA: Your questions regarding --
3 Mr. Lucco, regarding public relations I think warrant a
4 look -- I'm sure you've looked at it -- at the
5 *Burke vs. Lakin* case. And clearly there the issues of the
6 litigating -- clearly the issue there of defense in the
7 court of public opinion is not something that's subject to
8 work product. I think those precise words were used. So I
9 think that's directly applicable to the public relations
10 style assertions of privilege that they're making.

11 THE COURT: But would you agree, even if I adopt
12 that view, there is a distinction between that public
13 relations in furtherance of a particular case versus
14 something else that amounts to advocacy for a particular
15 candidate or against a particular candidate? Those are two
16 different things.

17 MR. CANCELILA: Or contrary to tort reform generally.
18 Those may well be.

19 THE COURT: Those are political issues.

20 MR. CANCELILA: Right.

21 THE COURT: Okay.

22 MR. CANCELILA: The notion of -- I think the point
23 was raised that Judge Herndon already ruled that the statute
24 of limitations defense wasn't valid. That wasn't the
25 ruling. The ruling was denying a motion to dismiss on the

1 strength of the allegations and accepting the allegations as
2 true, rejecting the statute of limitations defense there in
3 that context, and accepting plaintiffs' allegations related
4 to equitable estoppel. There's no ruling that that defense
5 or issue is out of the case by any stretch of the
6 imagination.

7 *THE COURT:* What about the -- do the plaintiffs
8 need equitable estoppel if the second predicate act is
9 proven? If they don't prove it -- if you don't prove the
10 second predicate act, you don't have the RICO case anyway,
11 so --

12 *MR. CANCILA:* We would argue that they do need
13 that, yes.

14 *THE COURT:* You need the second predicate act?

15 *MR. CANCILA:* Right, right.

16 *THE COURT:* So what do they need equitable estoppel
17 for?

18 *MR. CANCILA:* They need to be able to establish,
19 you know -- and I think Judge Herndon used this language in
20 his ruling, that there was due diligence exercised, you
21 know, in the pursuit of whatever needed to be known to
22 reflect the injury, to reflect the second act, to reflect
23 the supposed concealment. He had language that went to the
24 due diligence issue that directly goes to what they knew and
25 when they knew it. Clearly those defenses aren't off the

1 table. So, you know, I just wanted to address that
2 assertion right away.

3 *THE COURT:* The order speaks to both things.

4 *MR. CANCELA:* Right. The notion --

5 *THE COURT:* Yeah. And it doesn't dispose of in
6 terms of the case. The case is still going.

7 *MR. CANCELA:* It is.

8 *THE COURT:* It's not disposed of on the pleadings.

9 *MR. CANCELA:* Right. But it didn't reject the
10 defenses other than for pleading purposes.

11 *THE COURT:* True.

12 *MR. CANCELA:* The notion of what these documents
13 may show or may not show -- and it's just impeachment
14 material. The thing is, is these are so striking of
15 documents that we attached an Exhibit 5 to our reply, and
16 this just illustrates how directly, directly diametrically
17 opposed the contentions are that were made by Wojcieszak in
18 behalf of the Tillery Group and those asserted by plaintiffs
19 here.

20 So this is Exhibit 5 to the reply to the Tillery
21 brief, so it's -- the e-mail is from Wojcieszak to
22 Mr. Tillery and a number of other individuals as well. The
23 subject is, "Money from Tort Reformers", and the text is:

24 *JUSTPAC dropped another 300K into Karmeier's war*
25 *chest today, Thursday. JUSTPAC is getting its*

1 dollars from the American Tort Reform Association,
2 a/k/a Philip Morris Tobacco.

3 It's just directly contradictory to allegations
4 that are made by plaintiffs. And this is illustrative.

5 Now, you know, are there other e-mails there that,
6 you know, say these sorts of things? We don't know. But
7 there are 400-plus documents that have been withheld that we
8 have strong reason to believe will provide similar evidence
9 to contradict the assertions that plaintiffs have made,
10 Your Honor.

11 THE COURT: I'm looking at the wrong Exhibit 5, I
12 believe. I apologize.

13 MR. CANCELA: It was exhibit to the reply
14 submission. There were maybe -- there were more exhibits.
15 There was a thicker stack that went with the old one.

16 THE COURT: Okay.

17 MR. CANCELA: And in terms of it being a simple
18 RICO case with mail fraud being asserted, it goes back to
19 this notion to what plaintiffs say was false or unstated or
20 not included in State Farm's filings are the very items that
21 these documents address. I don't know how one can get more
22 to the heart of the matter than directly inconsistent
23 assertions by Wojcieszak to track those contributions to a
24 different entity. I mean it's -- it basically undercuts
25 plaintiffs' assertions in this case as to the contended

1 asserted misleading or unstated items contained in
2 State Farm's submissions.

3 *THE COURT:* It's not impeachment --

4 *MR. CANCILA:* Correct.

5 *THE COURT:* -- is what you're saying?

6 *MR. CANCILA:* Correct.

7 *THE COURT:* It's -- he's claiming to have direct
8 evidence, personal knowledge of a fact that rebuts
9 completely the assertions that he's made as it relates to
10 State Farm?

11 *MR. CANCILA:* Right. Just as he claimed to have
12 personal knowledge in the affidavits that were filed, you
13 know, on the strength of his investigations in the Avery
14 case, two times in 2005, once in 2011. And he even states
15 in those affidavits, you know, that he supports the
16 assertions being made by plaintiffs in their submissions.

17 *MR. CANCILA:* Thank you.

18 *THE COURT:* Thank you. Okay. Let's take a break.
19 Start back in 15 minutes.

20 **(Break)**

21 * * * *

22 **(Reconvened)**

23 *THE COURT:* We're going to now address privilege
24 assertions between the plaintiffs and defendants, and start
25 with plaintiffs. Mr. Blonder?

1 MR. BLONDER: Good afternoon, Your Honor.

2 THE COURT: Good afternoon.

3 MR. BLONDER: There are essentially three issues
4 that we've addressed in the briefs, and I obviously don't
5 want to repeat what's in the briefs and Mr. Lucco's argument
6 about an hour ago and some of the Court's back and forth.
7 Don't want to retread over landscape that's already been
8 plowed.

9 I guess to start out, does the Court have
10 particular issues that it wants me to address or just kind
11 of take it in the order we dealt with it in the briefs?

12 THE COURT: Take it in that order and I'll ask you
13 questions as you go.

14 MR. BLONDER: That's fine.

15 So the first issue, Judge, that we raise goes to
16 the investigators, and we're talking about Mr. Wojcieszak
17 and Mr. Denton. And they were employed by Mr. Clifford and
18 a couple of the other plaintiffs' lawyers in this case -- in
19 the Avery case and this case post-2005 for a period until
20 approximately 2006, 2007, and then it was dormant 'til after
21 the Caperton case comes down from the Supreme Court in
22 2008/2009. They're re-engaged and are performing work at
23 the direction of Mr. Clifford, Mr. Barrett, Mr. Ball. So
24 the issue goes to, we're asserting work product.

25 THE COURT: When did Caperton come out?

1 MR. BLONDER: 2009.

2 THE COURT: So they were re-engaged?

3 MR. BLONDER: They were re-engaged in connection
4 with the *Caperton* case.

5 THE COURT: Before it was decided?

6 MR. BLONDER: Yes; while it was pending, before it
7 was decided. And there are materials that we are claiming
8 as work product. It was work that was done at the direction
9 of the lawyers, specifically him, Mr. Clifford, Mr. Ball,
10 Mr. Barrett, and it was kind of saying, *Hey, go look at*
11 *this. Here's what we found.* It's kind of building a case
12 together. Again, and it culminated in Mr. Wojcieszak
13 providing an affidavit in 2005 in the motion to recuse that
14 was filed in the state court, and subsequently in 2011.

15 So we believe -- you know, Court talked about the
16 *Appleton* case and we cited that in our briefs, and it's
17 directly on point. In terms of the fact that there is an
18 investigator involved doesn't mean it's not work product.
19 And here particularly, it was done at the direction of the
20 lawyers and it's about building the case. One thing, we
21 have approximately 900 entries on our privilege log. As we
22 made clear in our response brief, we have some of our
23 colleagues re-going through all of those in the sense we are
24 going to be producing some of the materials on that
25 privilege log.

1 THE COURT: So let's talk about work product.
2 Obviously, you know, I have a view that I'm trying to stay
3 open-minded about in terms of what the *Appleton* case says,
4 but, you know, my view of it is: It applies to
5 investigators, and the issue of whether it's in this case or
6 not is not an issue here. That's really just for what we've
7 argued before. So the Court's view is, it applies to
8 investigators.

9 But we're going to obviously get to the issue of
10 waiver, not -- let's set aside sharing of documents.

11 MR. BLONDER: Okay.

12 THE COURT: Using the affidavit, okay, there's been
13 multiple times plaintiffs have made assertions and continued
14 to in support of the crime fraud exception, relevant time
15 period, based on these investigations, so they're at issue.
16 They're being utilized in the case as we speak. So we have
17 to engage in an analysis of waiver as to issues surrounding
18 voluntarily or intentionally disclosed material and then
19 those documents which fairly fall within that subject matter
20 and then -- and this is the hard part -- well, subject
21 matter, of course, is a hard part too because how far does
22 subject matter go? But then what should fairly be
23 disclosed? And really, that's -- as to your work product
24 assertions, at a minimum, we've got to go through that,
25 don't we?

1 MR. BLONDER: I think we may, Your Honor. And one
2 way to look at that is, you talk about the 2005 and 2011
3 affidavits from Mr. Wojcieszak in the Illinois Supreme Court
4 in connection with the petition to recall the mandate and
5 the motion for recusal. Now, one of the interesting issues
6 there when you talk about work product protection in this
7 case is, the submissions of those motions, the affidavit of
8 Mr. Wojcieszak, isn't at issue in this litigation because
9 the issue is not, what did plaintiffs allege to try and get
10 the Court to do something; the issue is, State Farm had
11 information that they either made an affirmative
12 misrepresentation or an omission, and we look at it with
13 respect to State Farm's conduct. What plaintiffs said in
14 connection with those filings in the Illinois Supreme Court
15 is largely irrelevant because that's not an issue that's in
16 the case. That's number one.

17 THE COURT: Well, you're not going to rely on this
18 investigation to prove the facts that you're alleging that
19 State Farm essentially committed a fraud? You're not going
20 to rely on Mr. Wojcieszak or Mr. Denton for that?

21 MR. BLONDER: We may or may not. You know, our
22 hope is to be able to have all the underlying third-party
23 materials, then start backing up what we've alleged,
24 obviously to the extent we get it. That being said, we may
25 need Mr. Wojcieszak describing how he had to go through the

1 garbage cans to get the information or about something that
2 someone may have said to Mr. Wojcieszak or information in
3 his personal knowledge. Can't rule that out at this
4 juncture. He is listed as a potential witness.

5 But the fundamental here is State Farm's conduct,
6 what State Farm did or didn't do, and to the extent that
7 plaintiffs have at this point used the affidavits, it was in
8 connection with pleading to the Illinois Supreme Court in
9 the form of a motion or a pleading to take affirmative steps
10 that the Court declined to take. That's not an issue that's
11 in play here in the sense of use of those affidavits, the
12 information we may need in connection with our case here,
13 but even if there has been a waiver, it then goes to still
14 kind of a balancing of what level of work product we're
15 talking about versus State Farm's need for the information.

16 *THE COURT:* Let me just back up. Are you saying
17 you haven't relied on those affidavits in this case to make
18 your -- to begin building it, to make factual assertions
19 about what those individuals claim in their affidavits?

20 *MR. BLONDER:* No. What I'm saying is that
21 information has formed a core or a set of information that
22 we have used and taken and worked with in developing our
23 case, developing our theory. We've subsequently served
24 subpoenas, received documents through disclosures, received
25 documents in discovery which have added to that and have

1 kind of taken it in some different directions and nuances
2 from what we had anticipated before.

3 THE COURT: These are still folks whose affidavits
4 and work you've disclosed and relied on, disclosed to the
5 Court, relied on in your arguments to the Court, continue to
6 rely on in your arguments to the Court. I mean --

7 MR. BLONDER: We've used certain facts that were
8 alleged there. What we haven't -- to the extent --

9 THE COURT: Have you cited to an affidavit?

10 MR. BLONDER: Yes, we have.

11 THE COURT: That's what I thought.

12 MR. BLONDER: I'm not trying to walk away from
13 anything that we've done or not done.

14 THE COURT: So they're witnesses in the case that
15 you're not only my -- you've already used them, haven't you?

16 MR. BLONDER: We've used them for certain purposes.
17 The case law in terms of waiver talks about testimony at
18 trial, trial or deposition, which we haven't used them for.
19 In terms of it's a line in the cases that State Farm relies
20 on in its brief. I believe we distinguish those cases in
21 our response on the testimonial issue. It's page 5 of our
22 response. The one case that was not a testimonial situation
23 is the *Belmont Holdings vs. Suntrust Banks* case from the
24 Northern District of Georgia where the District Court held
25 that the party asserting work product had presented --

1 THE COURT: Bare with me for one second.

2 MR. BLONDER: It's page 5.

3 THE COURT: I'm looking at page 5 of your response.

4 MR. BLONDER: We're talking about *Nobles, Brown vs.*
5 *Trigg, Kallas vs. Carnival*. Again, all the cases they put
6 forth are situations where the person testified at trial or
7 in the deposition, and again, with the one case that's an
8 exception to that rule, which is where the court determined
9 in a hearing that the investigator's testimony was being
10 used in a misleading or selective way, and fundamental
11 fairness required, you know, disclosure of the rest of the
12 information. So we're not at that stage. So when we talk
13 about the law that's been laid out on this --

14 THE COURT: Isn't an affidavit just per se
15 testimonial? I mean it's a sworn statement. It's being
16 offered to prove the truth of the matter asserted. It may
17 be hearsay but it's certainly testimonial.

18 MR. BLONDER: It's testimonial by nature but,
19 again, the case law that's been put forth to the Court from
20 State Farm specifically talks about kind of a different set
21 of circumstances. Talk about --

22 THE COURT: Trial?

23 MR. BLONDER: Yeah.

24 THE COURT: So work product waivers don't kick in
25 until the moment that witness gets on the stand, and then

1 when that happens, hold off, everybody -- the jurors go back
2 into the witness room. We've got a whole bunch of
3 disclosing to do.

4 *MR. BLONDER:* If I was on the side doing the
5 disclosing I would love that rule. If I was on the other
6 side I would hate that rule. It would probably come at the
7 time the parties do their final witness list.

8 *THE COURT:* After the close of discovery?

9 *MR. BLONDER:* Either after the close or --

10 *THE COURT:* That's kind of unworkable too.

11 *MR. BLONDER:* The Court can, under its own rules,
12 kind of re-open in limited circumstances for information, so
13 it's not a position where someone would be irreparably
14 harmed because they didn't get it. It certainly shouldn't
15 be dealt with at the outset of litigation on the kind of
16 possibility they may testify, may not testify, and just open
17 the barn door at the outset. Because again, these are --
18 we're talking about people who specifically did work at the
19 direction of the lawyers to help build the case, so --

20 *THE COURT:* I got you on that. There's no doubt.
21 I mean I'm with you. These are -- I think I've signaled
22 pretty strongly, I don't have a problem with an investigator
23 who's employed by counsel as qualifying within the work
24 product umbrella. This is mostly about then the next
25 question of waiver, and so because -- what I'm getting at

1 then is, do we -- don't we have to go through the 502
2 analysis then? But you're saying we have to wait and see.

3 MR. BLONDER: Personally, I think we need to wait
4 and see, but to the extent the Court cease it differently,
5 then we would need to go through the 502 analysis at this
6 juncture. Again, I think the more pragmatic approach would
7 be to defer this issue because one of the particular
8 components is going to be the defendant's ability to get the
9 information through alternative means. In terms of the
10 prejudicial and probative balancing of the information, how
11 essential is it to their claim, and can they get it through
12 alternative means?

13 THE COURT: But if it's been waived, we don't even
14 arrive -- I mean that is available to the other side.
15 That's their argument of last resort. So they don't have to
16 rely on that until they lose on waiver.

17 MR. BLONDER: Correct. But the issue then that
18 we've got is that focuses on the scope of that waiver. If
19 the Court's going to go into the 502 analysis, the question
20 is: How broad or narrow is that waiver and to what does it
21 actually apply?

22 THE COURT: Yeah, agreed. Yeah. I mean when we're
23 talking about waiver, that's -- it's certainly not as all
24 encompassing as -- well, it's not all encompassing.

25 MR. BLONDER: It's certainly not a situation here

1 where the 900 documents -- I believe it's 900 on our
2 privilege log to which we're asserting the work product
3 doctrine -- would automatically be turned over. And I
4 think, again, to the extent the Court wants us to go down
5 that route --

6 *THE COURT:* That doesn't surprise me that you would
7 say that. Very well could be the case.

8 *MR. BLONDER:* To the extent the Court's going to go
9 down that path the parties would need to kind of address the
10 502 analysis and the scope of the waiver so that we could
11 have informed discussion on that.

12 *THE COURT:* I would also agree with that.

13 *MR. BLONDER:* The second issue that we framed is,
14 the plaintiffs want a log of the communications between and
15 amongst plaintiffs' counsel, kind of the discussions we've
16 had between the sides basically saying, we don't believe
17 that you can get those under any circumstance, to which we
18 agreed to say, okay, first let's focus on the issue, do we
19 need to log them; then if we do have to log them, kind of
20 next step will be a discussion of, once we log them, what's
21 privileged, what's not, kind of what's fair game? And our
22 position is, that they're not entitled to our
23 communications.

24 So for example, if I'm e-mailing to Mr. Clifford
25 about what arguments should we be making or how should we

1 present something, that's not something they're entitled to
2 know. I've never been in a case in 20-plus years of
3 practice I've had to log my communications with co-counsel.
4 It could be Mr. Thrash looking at the Chamber of Commerce
5 documents and is finding all kinds of things as he's
6 e-mailing us as we're here. The idea that we would have to
7 log those communications, that they're entitled to our
8 internal communications, just to me is nonsense.

9 And to the extent we're going to start going down
10 that path, I mean that's the fundamental idea of what's
11 protected here is the communications and the lawyers putting
12 their case together. So I don't know what more I need to
13 say on that. If the Court has questions on that issue,
14 happy to address them, but --

15 *THE COURT:* Well, I may as well ask this question:
16 They say you've injected the issue of equitable estoppel,
17 and this relates to both your investigators' knowledge and
18 yours, and so it's possible that your internal
19 communications between lawyers would be reflective of that;
20 therefore, you must log it so that we can look at it and
21 see. Then we can make an argument.

22 *MR. BLONDER:* If we're going to that, we're not
23 talking about waiver in terms of the 502 analysis; we're
24 talking about whether it's still protected, and we go
25 through, hey, can State Farm get the information through

1 other means? Is it essential to a fundamental issue in the
2 case?

3 Mr. Lucco made the point, when talking about
4 statute of limitations, and I think Mr. Cancila addressed it
5 as well, Judge Herndon, on the pleadings, said, hey, look,
6 second predicate act is 2011, alleged, so lawsuit fits
7 within that second predicate act. So --

8 *THE COURT:* I was just looking at that order. So
9 that's the primary holding.

10 *MR. BLONDER:* Correct.

11 *THE COURT:* Of course, it assumes that you proved
12 it.

13 *MR. BLONDER:* Assumes we proved the second
14 predicate act. As you said before, if we don't prove the
15 second predicate act, we lose.

16 *THE COURT:* So what do you need equitable estoppel
17 for?

18 *MR. BLONDER:* I don't know that we do. I think in
19 the original briefs on the motion to dismiss it was about
20 suspenders, kind of, let's address everything that we think
21 can address. I wasn't actually in the case at that time,
22 nor was Mr. Clifford, nor was Mr. Bellas.

23 *THE COURT:* Because if it's not an issue, then
24 that's the primary basis upon which they're asking for it.

25 *MR. BLONDER:* Even if you look at that as an issue

1 in the case, the inquiry that --

2 THE COURT: You're not prepared to give up on that
3 one?

4 MR. BLONDER: Oh, no, I'm not prepared to give up
5 on that one.

6 THE COURT: I was going to ask. Doesn't look like
7 you're willing.

8 MR. BLONDER: No. But the inquiry would be State
9 Farm -- an inquiry on equitable estoppel or the fraudulent
10 concealment could look at when State Farm admitted or
11 conceded certain facts without ever having to get into, what
12 did the plaintiffs figure out and what was conjecture in
13 their mind and what did they think they might be able to
14 prove?

15 We're alleging that State Farm made
16 misrepresentations by omission and commission, so the
17 question would be, for the equitable kind of tolling,
18 fraudulent concealment: When did State Farm concede certain
19 things? When did they put certain things out in the open,
20 some of which has been after this lawsuit was filed? So
21 there's a factor where, even if the equitable tolling
22 becomes -- comes into play, the plaintiffs' communications
23 between their lawyers is still not necessary to get to that
24 issue because the Court can look at it through the eyes of
25 State Farm, the primary alleged wrongdoer in this case.

1 The third issue that we've addressed is the
2 communications between State Farm and its attorneys relevant
3 to the two briefs that form the predicate acts. And we're
4 not talking about trying to get all the files, all the
5 communications, kind of all the back and forth.

6 *THE COURT:* But you want them to log it just like
7 they want you to log yours?

8 *MR. BLONDER:* No. We want them to log specific
9 things.

10 *THE COURT:* How else do you pick which ones you're
11 going to ask me to look at?

12 *MR. BLONDER:* We'd like a very specific thing,
13 which is they made representations, commissions, and
14 omissions in the two briefs. We are entitled to find out
15 the basis for the statements in the briefs that we allege
16 are fraudulent or misleading. So what we're asking for is
17 the communications that relate to the facts in those briefs,
18 a very narrow set of information or guidelines, and --

19 *THE COURT:* You are entitled to know the basis for
20 those representations, there's no doubt about that, the
21 factual basis for those representations. Now -- or you can
22 ask the question anyway. I might be phrasing this
23 improperly because their position is, in part, we're just
24 responding to the facts you alleged. So it becomes a bit
25 convoluted. But in any event, that's very different from

1 them -- and we want the communications that are relaying
2 those facts to the lawyers.

3 *MR. BLONDER:* Well, again, assuming that we're
4 alleging that there's an omission or commission here, the
5 question is: Did State Farm mislead its own lawyers with
6 respect to the filings and the briefs or did the lawyers
7 take information which was provided by State Farm and use it
8 in a way to perpetrate the underlying mail fraud? The
9 question is: How did the facts get in the brief and who
10 knew what to put them in the brief? Again, does it lie at
11 the lawyers who are on the briefs or does it lie at
12 State Farm?

13 *THE COURT:* So, you know, they're saying that
14 you've made this allegation in your briefs here in this case
15 that you didn't know, you didn't have enough information to
16 know certain things until it was revealed in a filing. So
17 can they just on that basis say, not only is it essential
18 for us to establish equitable estoppel, we think that that's
19 wrong, we think it's a lie, so we are entitled to those
20 communications between counsel, between counsel and the
21 investigators so that we can verify where it came from.

22 *MR. BLONDER:* Again, that goes to what's an
23 essential issue in the underlying case. If the Court wants
24 to draw a line that says, look, you're not -- plaintiffs,
25 you're not going to get the actual communications between

1 State Farm and its lawyers; and State Farm, you're not going
2 to get the communications between the investigators and the
3 lawyers, or the internal communications the lawyers on the
4 plaintiffs' side, we can live with that. We can live with
5 one set of rules. State Farm has been pushing very hard --

6 THE COURT: Let me just -- when you throw in
7 investigators, that's different. Internal communications
8 and communications with your clients are the same. We're
9 talking apples and apples to State Farm's internal
10 communications and communications with its client.

11 MR. BLONDER: Again, with the one inquiry that I
12 laid out for the Court earlier, which is taking the
13 statement in the brief and asking point blank, what's the
14 factual basis for the statement?

15 THE COURT: They've already said the basis for the
16 statement is advocacy.

17 MR. BLONDER: Okay. So --

18 THE COURT: And I did ask the question, did you
19 have -- because you've presented me with one thing that was
20 very clear, and I'm not saying it's material or not. I'm
21 not going to reveal that because I don't know that I've made
22 that decision anyway, but the -- but you have a statement in
23 an e-mail from Mr. Murnane saying, *I've considered myself a*
24 *de facto campaign for a limited period of time.*

25 MR. BLONDER: Correct. Page 65, I believe, of the

1 exhibit.

2 *THE COURT:* So -- but their position on that was,
3 well, he wasn't the campaign manager. There wasn't evidence
4 that he was that was submitted. And furthermore, when asked
5 point blank, we didn't know that.

6 *MR. BLONDER:* Well, Mr. Cancila was very careful.
7 He said, "as far as I know". So it wasn't, State Farm
8 didn't have that, State Farm didn't know that; it was, "as
9 far as I know".

10 *THE COURT:* But, again, you know, that's -- if
11 you're trying to say that the lawyers were the instruments
12 in some way by being fed fraudulent information, certainly
13 verify the lawyers didn't know.

14 *MR. BLONDER:* And I'm not suggesting -- I'm not
15 trying the suggest that the lawyers, you know, consciously
16 did something inappropriate. Not at all. The issue though
17 goes to, what information lawyers were presented by
18 State Farm that the lawyers were given to work with. And
19 that's why we make the argument that the lawyers were the
20 kind of instrumentality with respect to the crime fraud
21 exception that we're raising in our briefs. But as I said,
22 to the extent that the Court wants to adopt the rule that I
23 suggested, you know, I mean, we can live with that, again,
24 so long as we're able to explore the factual bases for the
25 statements in the briefs.

1 THE COURT: If the case is about lawyers engaged in
2 that -- the crime fraud exception is a pretty serious matter
3 to be alleging. That's one -- I mean, you know, I'm looking
4 at that and saying -- I think they're accurate in terms of
5 what was in the brief, in terms of what has been presented
6 by the other side.

7 MR. BLONDER: I think it's a line though in terms
8 of -- again, we talked about fraud by commission or
9 omission. I think that there are certainly things that --
10 even if a statement in the brief is not an outright
11 falsehood, it's certainly misleading with respect to the lay
12 of the land and the omissions and the duty of candor of
13 complete disclosure once you say something.

14 THE COURT: Well, but what I have in front of me
15 is, from briefing on previous -- briefing on the scope and
16 looking at what has been also presented. You've got a check
17 from the Chamber of Commerce; you got a check from
18 State Farm and the Chamber of Commerce. There's a whole
19 bunch of people that are part of the Institute for Legal
20 Reform. When I say "people", people and corporations to the
21 extent they're different.

22 MR. BLONDER: Absolutely.

23 THE COURT: And there's a whole bunch of people who
24 are directors, to include, yes, Mr. Rust, who apparently
25 wasn't there when the vote was made -- not an insignificant

1 fact. But so there's -- and my understanding from a
2 previous hearing that we had, and I can't remember if it was
3 Mr. Cancila who was telling me this or not, but, you know,
4 they've got a bunch of membership levels at the ILR, and I
5 don't know where State Farm falls -- if they have silver,
6 gold, or diamond membership -- but it's a million a year.
7 How many have that same level? I don't know. I still
8 don't -- I don't know. So one of the key assertions is they
9 paid them a million bucks and then, you know, turned around
10 a month later and voted to send it right back.

11 *MR. BLONDER:* They round tripped it basically
12 through there. I believe in the previous hearing we talked
13 about the article from Tom Donohue from the Chamber and Wall
14 Street Journal and how the Chamber was putting itself out
15 there as a means by which contributions could be made to
16 candidates that didn't have to be reported. That was the
17 discussion we had last time when we were talking about the
18 timeframe for discovery.

19 *THE COURT:* You've got -- I mean it certainly was
20 targeted, but that wasn't the only place it was targeted.
21 And there were other interests expressed in those very
22 documents, medical malpractice reform, that community, the
23 asbestos defense community, all those folks.

24 *MR. BLONDER:* Judge, I think our fundamental
25 position is, and one of the reasons we cited the ISBA

1 materials, is State Farm's brief created -- in the Illinois
2 Supreme Court, created the impression State Farm gave a
3 de minimis amount to Justice Karmeier and that was the
4 extent of their involvement. What we seem to be finding
5 out, through discovery, at least to date, is, this appears
6 to have been a well orchestrated well calculated effort to
7 change the composition of the Supreme Court in Illinois
8 while the Avery case was there. I mean, again, the issues
9 of the ISBA bear that out. Some of the issues of the
10 financial contributions we've been tracking that we attached
11 to our briefs, that's the point here. And that's a far cry
12 from the position that's laid out in the briefs.

13 *THE COURT:* But there were lots of entities that
14 were involved in that effort. Yes, Avery was pending, but
15 there was -- Justice Karmeier had a lot of supporters.

16 *MR. BLONDER:* He did. And our position --

17 *THE COURT:* Wasn't just State Farm.

18 *MR. BLONDER:* That's correct. But our position is,
19 had State Farm come clean with the extent of their
20 involvement in this well orchestrated, well funded campaign,
21 Karmeier would have had to recuse himself or the Illinois
22 Supreme Court could have done something differently.
23 State Farm, in minimizing its involvement and not presenting
24 the fair picture of the complete involvement it had, by
25 omission or commission, committed mail fraud by putting the

1 brief in the mail. I mean that's a fundamental position
2 we're taking on the mail fraud claim and how this fits in
3 the crime fraud exception.

4 *THE COURT:* The dots don't connect. I mean from
5 the -- from State Farm to Chamber back, there's not -- the
6 person who was supposedly voting wasn't there. I'm not
7 saying -- I don't know what you'll eventually be able to
8 prove, but today what I'm looking at, it's -- there was
9 money thrown in a pot and from that pot money went back. I
10 don't think that's -- you know, it's not a constructive
11 trust.

12 *MR. BLONDER:* Right. I understand. And again, I
13 don't want to belabor this point because I understand the
14 Court's point.

15 *THE COURT:* I'm belaboring it. Sorry.

16 *MR. BLONDER:* That's okay. So anyway, that was our
17 position on the crime fraud exception. Like I said, we
18 would -- we do think that that could be a workable rule of
19 this kind of -- not allowing kind of the inquiry on either
20 side with the limited issue that I talked about with the
21 Court.

22 *THE COURT:* Attorney-client privilege is a big
23 deal, there's no doubt about that.

24 *MR. BLONDER:* So that's what I have to say, unless
25 the Court has additional questions.

1 THE COURT: No. Thank you.

2 MR. SAFER: Your Honor, would you mind if we
3 addressed the crime fraud exception first?

4 THE COURT: That's fine, yeah.

5 MR. SAFER: The idea that the crime fraud exception
6 was put in their brief to get some sort of tit-for-tat is
7 silly. They're two totally different things. It's not
8 playing by one set of rules.

9 On the one hand, they are acknowledging that
10 there's a -- these are privileged communications that have
11 not been waived. They are saying there's an exception, the
12 most serious kind of exception there can be, crime fraud,
13 and the rules are, according to the Supreme Court, that they
14 cannot stand here on assertions or cite to their complaint;
15 they have to prove it, they have to come forth with
16 prima facie evidence that satisfies that crime fraud
17 exception: One, that a crime or fraud was committed; and
18 two, that the specific communication that they are seeking
19 furthered that crime or fraud.

20 Your Honor wouldn't know it from the plaintiffs'
21 briefs, but we have logged our communications with
22 State Farm relating to these briefs, relating to the 2005
23 brief and relating the 2011 brief. Those are contained on a
24 privilege log. Plaintiffs did not seek at all to identify
25 any specific communication for Your Honor.

1 THE COURT: Is that log in the record?

2 MR. CANCILA: It is.

3 THE COURT: I wanted to make sure I wasn't missing
4 something obvious.

5 MR. SAFER: If plaintiffs had any hope of
6 satisfying the second prong of that, they would have put it
7 in the record and they would have said, here are the
8 communications that we seek because here is the prima facie
9 case that those communications furthered the fraud. They
10 haven't done that, so there is no chance that they have
11 satisfied the crime fraud exception, so -- but the point
12 that we're playing by the same rules, that is a totally
13 different inquiry than, does the attorney-client privilege
14 apply to their communications with their investigators,
15 which could be part of work product, and have they waived
16 that? It's not playing by the same rules. Two totally
17 different inquiries, two totally different rulings.

18 THE COURT: Again, I hate to -- this isn't
19 hair-splitting. The investigators and their communications
20 with the investigators, or, rather, those documents which
21 reflect those communications, that's different.

22 MR. SAFER: Exactly. It's different.

23 THE COURT: The assertion is work product.

24 MR. SAFER: Yes.

25 THE COURT: But communications amongst the lawyers,

1 it's different but a lot less different. And you're
2 asserting that these things are relevant to -- that those
3 communications are relevant to a defense?

4 MR. SAFER: Right.

5 THE COURT: Based on?

6 MR. SAFER: Well, based on evidence that we have.
7 Mr. Cancila will address it. But clearly they have put
8 the -- you know, it's relevant to the defense. Even as we
9 go through the crime fraud exception, we will -- I can point
10 out to you when they are specifically relying on allegations
11 that are contained only in Wojcieszak affidavit.

12 THE COURT: Is it Wojcieszak?

13 MR. BLONDER: Wojcieszak.

14 MR. SAFER: Wojcieszak. Thank you, Your Honor. In
15 Wojcieszak's affidavit. They are using that as testimonial
16 evidence.

17 THE COURT: That's been conceded, and we're
18 really -- on that issue, when we're talking about that
19 narrower analysis of waiver, the issue really is -- and
20 maybe, Mr. Blonder, you haven't conceded it, but I think you
21 agree that an affidavit is testimonial. But if I'm wrong
22 about that, you can correct me. But the issue seems more to
23 be, when is it appropriate? Should we wait, should we do it
24 later?

25 MR. SAFER: I don't want to steal from Mr. Cancila,

1 but that is kind of an easy one, Judge. It is so
2 unworkable.

3 THE COURT: We can get back to crime fraud.

4 MR. SAFER: Yes, okay. Crime fraud.

5 There are -- first, with regard to the 2005 brief,
6 they say that -- State Farm says that it gave minimal
7 contributions, and that is false because State Farm gave
8 \$2 million to the U.S. Chamber of Commerce in 2003 and 2004,
9 and Ed Rust voted to send that money back to
10 Justice Karmeier.

11 It is critically important to look at what
12 State Farm did say in its brief because once you see that
13 you say that there is absolutely nothing to plaintiffs'
14 argument. What State Farm said is: *Although plaintiffs*
15 *attempt to link large sums in contributions by a variety of*
16 *persons and organizations to Justice Karmeier's campaign to*
17 *State Farm, their moving papers and supporting*
18 *documentation, in fact, reveal that a limited number of*
19 *State Farm officers and employees made quite modest*
20 *contributions to Justice Karmeier's campaign.*

21 It was a comment on plaintiffs' allegations, moving
22 papers, and supporting documentation. That cannot -- that
23 comment on the adequacy of their moving papers cannot
24 support an allegation of fraud, and the Apotex case is
25 squarely on point. Common sense tells you that.

1 Second, the allegations of the misrepresentation --
2 that support the misrepresentation are flawed; that is, that
3 State Farm's \$2 million contribution to the U.S. Chamber
4 over two years, 1 million a year, that is their dues, that
5 that was a contribution to Karmeier. First of all, there is
6 no evidence of earmarking. As Your Honor pointed out, the
7 plaintiffs' own exhibits -- in Exhibit 2, for example, shows
8 that there are a number of different things that this money
9 is going to be used for. It proves that there is no
10 earmarking. It says, on the page Hale 823, that the board
11 approved spending between 1.8 and 2 million to try to
12 improve the litigation climate in Illinois. Goes on to say:
13 *Similar programs will be mounted in Mississippi,*
14 *West Virginia, and in California.*

15 And at the end of that same exhibit, 1296 -- it's a
16 separate document talking about the same vote -- it said:
17 *The board approved a comprehensive public relations campaign*
18 *for Illinois. The campaign will highlight the state's*
19 *flawed legal system, particularly in the southern part of*
20 *the state, including Madison County, and will educate the*
21 *public about the importance of having judges who will uphold*
22 *the rule of law with integrity and impartiality.*

23 So plaintiffs' own exhibits show that their
24 assertion in the brief is false. It's not -- the board did
25 not vote to send the money back -- State Farm's money, no

1 less -- back to Justice Karmeier. Of course, as Your Honor
2 points out, plaintiffs' brief says, quote, "*Ed Rust voted,*
3 *on September 29th, 2003, to send that money back to Illinois*
4 *for the Karmeier campaign, and for the ILR to work with the*
5 *I C J L to help Justice Karmeier.*" That was false;
6 patently, demonstrably false. Rust was not at the meeting.
7 And by the way, the absurdity of using, as a RICO predicate
8 or fraud, a lawyer's allegation --

9 THE COURT: Let me just -- let me ask you one
10 thing.

11 MR. SAFER: Yes.

12 THE COURT: Does he have proxy?

13 MR. SAFER: There is no evidence that they took any
14 kind of proxies, Your Honor.

15 THE COURT: You don't know whether --

16 MR. SAFER: No. Nor is there any evidence, none.

17 THE COURT: I'm not suggesting there's evidence;
18 I'm just asking the question.

19 MR. SAFER: Right. Yes. I appreciate that,
20 Your Honor. But at this point they have to come forth with
21 evidence. They didn't say he voted by proxy; they said he
22 voted. And he did not. It is demonstrably false. And by
23 the way, if a lawyer's statement in a brief is fraud, they
24 just committed it because that was an absolute false
25 statement and now they're one predicate away from a RICO

1 claim. That's the absurdity of this process.

2 Third, the Tillery documents show that Wojcieszak
3 attributes that same money from the U.S. Chamber to Altreia
4 [ph.]. The facts are that State Farm contributed
5 \$2 million, which is less than two -- 3 percent of ILR's
6 contributions.

7 Second, other donors --

8 *THE COURT:* Did you -- I apologize. I missed that
9 part in here. So point -- is it in your brief?

10 *MR. SAFER:* It is, Your Honor.

11 *THE COURT:* Well, that's -- can you point me to
12 that.

13 *MR. SAFER:* I'm sure I can.

14 *THE COURT:* If it's in there, it's in there, but --

15 *MR. SAFER:* I will.

16 *THE COURT:* It's jumping out at me that you're
17 using this number right now. I don't remember.

18 *MR. SAFER:* What I will do is when -- while
19 Mr. Blonder is on his rebuttal, I will find that.

20 Other donors gave similar amounts, and there is no
21 earmark. There's zero evidence of fraud, let alone a
22 prima facie case.

23 The second argument they make is about Ed Murnane
24 that Your Honor has seized upon. And there, what State Farm
25 said was -- so on State Farm's responsive brief, Your Honor,

1 on -- it's attached.

2 *THE COURT:* Responding to plaintiffs?

3 *MR. SAFER:* Yes. It's attached as Exhibit 2, but
4 on the top of page 6 of the brief it says that State Farm's
5 contribution comprised less than 3 percent of the
6 contributions received by the ILR, and it --

7 *THE COURT:* Oh, okay. You're talking about --
8 okay. So this is the 300 -- what is that? 38 million?

9 *MR. SAFER:* Yes, exactly. And other ILR members
10 make these same level contributions.

11 So back to Murnane. What the 2005 brief stated
12 was: "Murnane, although in support of Justice Karmeier's
13 candidacy, was not Justice Karmeier's campaign manager and
14 not his campaign finance manager," end quote. Murnane was
15 not Karmeier's campaign manager; Tomaszewski was. Now --
16 and by the way, again, the Tillery documents show that
17 Wojcieszak was advocating dirty tricks against Tomaszewski
18 because he was Karmeier's campaign manager.

19 Second, the exhibits cited by plaintiffs
20 demonstrate that Murnane was not Karmeier's campaign
21 manager. Context and timing is important, Your Honor. So
22 there are two exhibits that reference this de facto campaign
23 manager; one that is wholly without any foundation has no
24 date, but clearly in the early days says that he acted to an
25 extent as campaign manager for a while, according to him,

1 and then on November 3rd there's an e-mail that says he's
2 hoping to hire -- they're hoping to hire a campaign manager
3 soon. He was a, quote, "senior advisor or de facto campaign
4 manager," end quote. That's a month before Karmeier even
5 announced his candidacy, Your Honor. So that Murnane
6 thought that he was a advisor/de facto campaign manager
7 before the campaign even starts is -- has no possible
8 relevance. There is absolutely no evidence that plaintiff
9 provides, as they must in making their prima facie case,
10 that State Farm even remotely knew, first, that Karmeier --
11 that Murnane was, in fact, Karmeier's campaign manager --
12 not that he thought himself as one, but that he was; and
13 there's not even evidence that State Farm was aware that
14 Murnane thought of himself, even for a day, as Karmeier's
15 campaign manager. So there is absolutely no evidence
16 regarding that.

17 Here is what's really important. Again,
18 plaintiffs' response contains patently false allegations.
19 Here's what they say, Judge: Quote, "State Farm also lied
20 about who managed Judge Karmeier's campaign." Pause for an
21 editorial comment: That's really strong. That's really
22 strong. State Farm lied about who managed Judge Karmeier's
23 campaign. Pick up the quote. Quote: "In its 2005 brief
24 State Farm, through its lawyers, told the Illinois Supreme
25 Court that Ed Murnane played no role in managing

1 Judge Karmeier's campaign." That's at page 11 of their
2 brief. That's patently false. That's not what State Farm
3 said. What State Farm said was, quote, "Mr. Murnane,
4 although in support of Justice Karmeier's candidacy, was not
5 Justice Karmeier's campaign manager or campaign finance
6 chairman and was not employed by Justice Karmeier's
7 campaign."

8 It doesn't say what plaintiffs boldly assert it
9 says, and was a lie. That's the second RICO predicate,
10 Judge. They've committed the crime in these briefs alone.
11 There is no evidence, none, let alone prima facie case, that
12 State Farm committed any fraud regarding the Murnane
13 assertion.

14 Finally, they talk about the 2011 brief. And
15 again, it is a comment on plaintiffs' allegations, and as
16 the first one, quote -- this is the quote from the brief:
17 Quote, "The evidence now submitted by plaintiffs does not
18 back up their assertions. According to plaintiffs,
19 State Farm somehow picked Justice Karmeier as a candidate,
20 managed his campaign, and made massive contributions to his
21 campaign. The picture plaintiffs attempt to paint was no
22 relationship to reality."

23 Again, if that's a fraud, then any time somebody
24 says in a brief before Your Honor, a party's position is
25 wholly without merit, then they open up a fraud

1 investigation if somebody can prove, well, actually there
2 was a portion of their position that everybody acknowledges
3 has merit, and that's fraud. It's patently absurd.

4 Second, plaintiffs again used false statements to
5 show that -- to try to make their prima facie showing. They
6 say, in their response, at page 9, State Farm gave \$150,000
7 to the Civil Justice Reform Group. That's true. Then they
8 say, this CJRG then sent 100,000 to JUSTPAC, the ICJL's
9 political action committee. That's false, patently false.

10 Predicate act number three: Plaintiffs' response,
11 Exhibit No. 4, shows you that. Plaintiffs response,
12 Exhibit 4 --

13 *THE COURT:* Plaintiffs' response to your opening
14 brief?

15 *MR. SAFER:* Yes. This is what they point to to say
16 that the CJRC sent \$100,000 to JUSTPAC. This, in fact --
17 this exhibit is, in fact, money received by ICJL, not
18 JUSTPAC, and you know that because in the second page
19 there's a little box.

20 *THE COURT:* Received by ICJL.

21 *MR. SAFER:* Yes. That's what this is a summary of.
22 Received at ICJL. And in fact, plaintiffs' own exhibit,
23 plaintiffs knew that State Farm gave zero to JUSTPAC. Look
24 at Exhibit 9 to their response -- I'm sorry, Exhibit 8.
25 Exhibit 8 to their response. Major contributors to JUSTPAC,

1 September 2003 to present, their own exhibit, State Farm,
2 absent. There is a -- State Farm made a disclosure in its
3 initial disclosures, document SF Hale 312, that lists all of
4 JUSTPAC -- contributions to JUSTPAC this time period.
5 State Farm is not there. Plaintiffs knew their assertion
6 was wrong.

7 *THE COURT:* Hang on one second. You call -- what
8 was the Bates number you gave? You said this was Exhibit 8
9 or Exhibit 9?

10 *MR. SAFER:* Exhibit 8. Exhibit 8. And then --

11 *THE COURT:* This has Murnane 326 major contributors
12 to JUSTPAC.

13 *MR. SAFER:* Yes, yes, that's right. So that shows
14 State Farm was not a major contributor to JUSTPAC.

15 And then there is another document, one that's not
16 attached to the exhibits. Because of the briefing, we
17 didn't reply to this response. But there's another
18 document, SF Hale 312, that has all of the contributions,
19 and State Farm is not on there. Plaintiffs knew that, yet
20 they made this false argument to support their false
21 assertion. The plaintiffs' argument relies on tortured
22 logic and unsupported assertions. They say ICJL was founded
23 by Shepherd, citing Wojcieszak -- sorry.

24 *THE COURT:* Wojcieszak.

25 *MR. SAFER:* Wojcieszak. Thank you. Between Tom --

1 I somehow keep melding Tomaszewski and Wojcieszak.

2 But Mr. -- citing their complaint, and Wojcieszak,
3 that's not proof. They now need to have to come forth with
4 some prima facie evidence. They then say that Shepherd
5 hired Murnane as ICJL's president, again citing their
6 complaint. They then say that Murnane talked to Karmeier
7 and other candidates; therefore, State Farm recruited
8 Karmeier. It's ridiculous. Again, zero evidence of fraud.

9 What they say is, to complete the picture -- so
10 everything that State Farm said was true. The only way they
11 can make it untrue is to blatantly misstate what State Farm
12 said. Now they say, well, to complete the picture, what
13 they should have said was, not only are plaintiffs'
14 allegations unsupported, but State Farm did contribute to an
15 organization that contributed to an organization that
16 contributed to an organization that contributed to
17 Justice Karmeier's campaign. That's ludicrous, Judge.

18 There is absolutely no proof of any crime in this
19 case whatsoever, let alone a prima facie showing, or, beyond
20 these misstatements, bold misstatements in plaintiffs'
21 briefs, the crime fraud exception should not be raised, let
22 alone found in this case. Thank you.

23 *THE COURT:* Thank you.

24 *MR. CANCILA:* Your Honor, I was going to address
25 the work product-related issues. And I won't repeat

1 arguments made in respect to the Tillery Group's assertions,
2 but did want to focus on the nature of the privilege
3 assertions being made.

4 Exhibit 6 is the list that comprises the log as to
5 the Wojcieszak and the Denton Tactical Investigations
6 documents, so --

7 *THE COURT:* And that's the same as the color-coded
8 copy that you gave me last time.

9 *MR. CANCELA:* Right. So Exhibit 7 is the
10 color-coded version which flags what we view as deficiencies
11 in the log.

12 Mr. Blonder didn't mention it, but there are other
13 privilege assertions at issue, and that's in respect to
14 Daniel Reece, who's another factual witness, an investigator
15 that plaintiffs have used. His documents that were withheld
16 are reflected on Exhibit 5. There's far fewer documents
17 reflected; they just have very generic descriptions.
18 There's like 15 items comprising 603 pages.

19 *THE COURT:* Your Exhibit 5 to your --

20 *MR. CANCELA:* Opening brief, correct. So that's
21 the road map, if you will, to the privilege assertions that
22 have been made.

23 *THE COURT:* Are you going to further address the
24 notion that they should be logging their internal
25 communications with one another?

1 MR. CANCILA: Yes, I definitely will. I can
2 address that right this second.

3 THE COURT: Let's start with that.

4 MR. CANCILA: First, just to be clear, we have
5 never asked for their post-Hale lawsuit filing
6 communications. In fact, the parties have an agreement,
7 memorialized by a letter, that reflects there's no post-Hale
8 lawsuit logging that is taking place, so we are not seeking
9 any of their post-Hale lawsuit internal, you know,
10 communications amongst counsel.

11 We are solely seeking their -- a log of their
12 communications amongst themselves during the timeframe where
13 they put their knowledge at issue, you know, where they've
14 contended, you know, an absence of knowledge as to what
15 would have given rise, you know, to their asserted RICO
16 claim. So we haven't asked for post-Hale logging. We've
17 only asked for pre-Hale logging. And we've asked for it,
18 you know, so that we get sufficient description to be able
19 to recognize whether or not the communication is of a
20 variety that would implicate the at issue waiver that we
21 contend they've undertaken.

22 THE COURT: So there's two components to this that
23 I think are important, or among those things that are
24 important: One, the notion that the equitable estoppel is
25 even important to the inquiry. I know that Mr. Blonder

1 doesn't want to say, *I'm not going to bring it up ever*
2 *again*, because don't want to say that at this point in time.
3 But Judge Herndon's order was very clear as to the primary
4 basis. Final predicate act was in '11, lawsuits filed less
5 than a year later. What's the issue? I mean if you're
6 talking about reliance, the folks who -- the allegation is
7 that the folks who were defrauded were in the Illinois
8 Supreme Court.

9 MR. CANCELILA: The allegation also is that
10 plaintiffs' counsel weren't in the know, and they only
11 learned that they had some claim to make after State Farm
12 supposedly made additional omissions in this September 2011
13 filing. So plaintiffs claim not to know the basis for their
14 claim, not to know things like whether or not Mr. Shepherd
15 was on the executive committee of the ICJL or various other
16 facts that they say were uncovered by the Reece
17 investigation.

18 THE COURT: What difference does that make?

19 MR. CANCELILA: They allege it in their complaint.

20 THE COURT: Again, you could put a lot of things in
21 the complaint. Some of it matters, some of it doesn't. I
22 mean is it a material allegation at all? Because what
23 prompts the second predicate act is, we got to do some more
24 briefing in the Supreme Court. Until you get to that point,
25 there's not a second predicate act.

1 MR. CANCILA: That's what plaintiffs are claiming
2 now. They've only identified two predicate acts, and for
3 sure the second act they identified was in September 2011.
4 The judge's ruling, they spent two to three pages on statute
5 of limitations and equitable estoppel or equitable tolling.
6 That was part of the basis of his ruling.

7 We believe we're entitled to pursue discovery
8 addressing the -- what he accepted on a pleading basis in
9 respect to the motion to dismiss. If they knew, if they
10 knew, you know -- I mean they say that new revelation was
11 this supposed concession that Bill Shepherd was on the
12 executive committee. If they knew that previously, how
13 could they make out an injury claim? When did their injury
14 flow? They said their injury wasn't triggered until, you
15 know, the second predicate act supposedly occurred. You
16 know, but if they had this knowledge previously, which they
17 claim they didn't know, you know, in their papers, which
18 they claim they didn't know in resistance to the motion to
19 dismiss, which they claim they didn't know in the complaint,
20 you know, then how could there have been injury flowing from
21 this second predicate act?

22 THE COURT: Because until you say it by dropping it
23 in the mail and filing it with the Supreme Court, there is
24 no second predicate act, so there's no RICO claim period.

25 MR. CANCILA: They haven't abandoned that argument.

1 And you asked specifically whether they had. We're
2 certainly entitled to pursue discovery of matters that they
3 have not abandoned.

4 *THE COURT:* So then the second question is though,
5 if it's something that's -- where when Judge Herndon says,
6 *You loose, but even if you didn't, I would find that this is*
7 *an issue,* on that basis you should get attorney-client
8 privilege communications essentially because that's what
9 you're asking for. The communications between the attorneys
10 are no different than those between you and your clients.

11 *MR. CANCELA:* Sure. They created the timing of
12 this second predicate act. That's -- I mean they created it
13 by their filing of a paper where they made various
14 accusations to which, you know, State Farm needed to
15 respond, so --

16 *THE COURT:* But what if -- what difference does it
17 make though if -- to state a RICO claim do you have to get
18 into whether or not the Illinois Supreme Court would have
19 otherwise decided that it was late?

20 *MR. CANCELA:* I think so. I think so. I mean
21 that -- they made these same assertions in trying to vacate
22 the judgment. They made the same assertions of what they
23 knew and how they knew it, you know, in those papers. They
24 made, if you will, testimonial use of the timing of when
25 they had that knowledge. They even included that

1 information about what they knew and when they knew it in
2 the affidavits that they submitted on behalf of the
3 investigators and the like.

4 They contended -- Reece contends in an affidavit,
5 *plaintiffs' counsel didn't know about this stuff before I*
6 *investigated it and found it out.* You know, so he put their
7 knowledge even at issue with his affidavit that he
8 submitted, in addition to these -- the defenses we've
9 asserted in respect to statute of limitations and equitable
10 tolling.

11 *THE COURT:* So if we assume, for purposes of
12 argument, like Judge Herndon did, for purposes of argument
13 only, that this is potentially relevant, then -- again,
14 nevertheless then, for that back-up, you want
15 attorney-client privileged information. I mean this is
16 different than, we want to know what the investigators knew.

17 *MR. CANCELA:* All we've asked for at this point,
18 Your Honor, is a log. We haven't asked to see any
19 documents, although we don't think they're privileged since
20 they put it at issue, but we're basically talking about
21 whether they have an obligation to log this stuff when
22 they've made assertions about what their knowledge is and
23 when they've known it throughout the complaint, throughout
24 various pleadings, and in argument in resistance to the
25 motion to dismiss. All we're asking for at this point is a

1 log.

2 *THE COURT:* That's kind of a big deal though, I
3 mean, to ask for a log for any communication, so whether
4 e-mail, phone call, face-to-face, going on at counsel's
5 office or between offices, that's a massive undertaking.
6 It's a huge undertaking. I can only imagine. How do you go
7 about even doing it for one thing? I mean I guess you can
8 try but it just -- it's rarely done because it's such a big
9 deal.

10 *MR. CANCELA:* But it's an unusual thing to put the
11 knowledge of the lawyers at issue in respect to the claims
12 in the complaint, and to make multiple occasions. And we
13 included just illustrations of that as an attachment to
14 our -- I can't recall whether it's the opening brief or the
15 responsive brief where we gave a listing, illustrations of,
16 you know, more than a dozen instances where plaintiffs had
17 put their knowledge at issue either in the complaint, in
18 resistance to the dismissal motion, or in resistance to the
19 motion to reconsider that the defendants filed.

20 *THE COURT:* Threw you off. Go ahead. You can
21 return to whatever track you want to get on to.

22 *MR. CANCELA:* That's great. So I think I've
23 covered what I wanted to cover relative to that logging
24 information to clarify what we have sought, to make it clear
25 that we haven't sought post-Hale filings -- or post-Hale

1 logging, and why we seek that information.

2 As you look at the logs, Your Honor -- and one of
3 the reasons we did the color-coding log was -- and this is,
4 by the way, the second version of the log, so you know,
5 you're seeing that they're a revised, cleaned up version of
6 the log. They gave us an earlier one couple months prior to
7 the one that is attached as Exhibit 6 and 7. This is
8 supposed to be the cleaned up version. There's at least a
9 couple hundred communications that are just between
10 Wojcieszak and Denton, and those are highlighted as yellow.
11 There's -- many of those appear to be PR, tort reform, media
12 coverage style issues that it's unclear how work product
13 could properly be asserted relative to that.

14 Some of them, there's just extraordinarily
15 deficient information upon which to base a privilege
16 assertion, and that's the blue highlighting that shows the
17 broad gaps of basic information that one would be expected
18 to give with a privilege assertion. And really, the entire
19 Reece log is deficient in its description of documents to
20 support the assertions.

21 I know that we have visited on --

22 *THE COURT:* When you say -- oh, I'm sorry.

23 *MR. CANCILA:* Which was Exhibit 5. I know we have
24 visited on whether the private investigators could assert
25 work product privilege as well or not, and I would just -- I

1 just want to take a quick run at flagging for Your Honor
2 this *Jentz* decision, *Jentz vs. ConAgra*. You may already
3 be --

4 THE COURT: I've read it. Look, it's from 2011.
5 It's looking at the *Sandra T.E.* case and distinguishing that
6 and saying that that case is not on all fours. An equally
7 applicable basis is that it wasn't a lawyer-driven
8 investigation, and so -- and you know, it occupies a blurb
9 about that in the decision. So I'm not being critical of
10 the order itself, but it doesn't address what we're talking
11 about, first off.

12 And secondly, we've got a 2012 Seventh Circuit
13 opinion that clearly states, clearly, that you hire an
14 investigator and it's direct -- and you're directing their
15 efforts and you've got a work product protection. So
16 there's nothing left of *Jentz* as to that particular issue
17 for me to think about.

18 MR. CANCILA: Okay. The next area -- I mention
19 that a number of those documents appeared to be of a PR
20 nature, public relations nature. We flagged those and we
21 also cited again to the *Burke vs. Lakin Law Firm* case
22 relative to those assertions.

23 THE COURT: For the PR assertions?

24 MR. CANCILA: Right.

25 THE COURT: Got you.

1 MR. CANCILA: They haven't made a First Amendment
2 privilege assertion, but the fact that the description looks
3 like it's PR suggested to us work product wasn't
4 appropriately asserted.

5 In terms of the testimonial use that plaintiffs
6 have made of the Wojcieszak and Reece affidavits, first I'd
7 like to flag -- I think Mr. Blonder conceded that they have
8 made use of those affidavits. Their brief, their
9 response -- you know, brief -- actually says --

10 THE COURT: I think he's agreed that he has used
11 them up 'til now, but the brief, if I'm not mistaken, is a
12 piece of advocacy that also says we may not use him at
13 trial. I might not be quoting it, but I think that's the
14 distinction, that we may not use him as a witness, but
15 correct me if I'm wrong, that's the gist of what I was
16 taking his argument.

17 MR. CANCILA: Here's what the brief actually said:
18 Even if those affidavits were the type testimonial use
19 inviting limited discovery, it would make no difference here
20 because those affidavits were not used in this case. So
21 there was --

22 THE COURT: And that's a fair point. I think how
23 Mr. Blonder explained that was -- that's what I heard up
24 here is they were used in the other case, and that's what we
25 were using them for now. I agree with you, they were used

1 in this case, so --

2 MR. CANCILA: All right. And then in terms of the
3 502 analysis.

4 THE COURT: But I also understand what
5 Mr. Blonder's argument was.

6 MR. CANCILA: Right, right. And I want to address
7 that argument as well. In terms of the waiver point, the
8 502 point, this would really be sort of an easier
9 circumstance in which to evaluate the waiver and what would
10 be fair or what would not be fair because the topics of the
11 extent of the waiver have been framed by the affidavits
12 themselves. So you have a lengthy Reece affidavit that was
13 submitted in Avery. You have three Wojcieszak affidavits
14 that were submitted in Avery. So those frame quite an
15 extensive picture as to what subject matter is involved.
16 And those are all in the record, you know, that were
17 submitted as part of the motion to dismiss briefing as well.

18 Now, this proposition that you have to use the
19 testimony at trial in order for it to make a difference and
20 constitute a waiver --

21 THE COURT: I don't agree with that.

22 MR. CANCILA: Okay. All right. And we actually
23 did cite several cases, you know, about that, and there were
24 more than the *Belmont*, you know, case, so we did flag a case
25 where affidavits had been used in a class certification

1 motion and that affidavit was deemed to be sufficient. We
2 cited a case where someone testified in the juvenile court
3 hearing and that was sufficient work product waiver to allow
4 for examination at trial, and that was in the *Briggs* case, a
5 Seventh Circuit case. So there's a number of cases that are
6 consistent with Your Honor's understanding there as well.

7 And of course, it's been the source of the various
8 factual assertions that they've made, which is a point that
9 Mr. Safer already made. And it's not just the notion of
10 making testimonial use; it's kind of a broader proposition
11 that's been recited in the case law that you can't use work
12 product materials in a manner inconsistent with the
13 protections. You can't use it as both a sword and a shield,
14 you know, in the same proceeding, which is essentially what
15 they've done in *Avery* and now here.

16 THE COURT: Well, I think he actually can but
17 there's limits.

18 MR. CANCELA: The other cases --

19 THE COURT: That's exactly what it's there for, so
20 that you can use it as a sword and a shield.

21 MR. CANCELA: The other cases -- the flag that I
22 mention, the one that involved the affidavit with the class
23 certification motion, was *Callis vs. Carnival* case, Southern
24 District of Florida case. Mr. Blonder acknowledged the
25 *Belmont* case. And then the *Briggs* case was the additional

1 case that I want to mention.

2 You asked Mr. Safer whether Mr. Rust had a proxy at
3 that meeting the September 2003 meeting. I know, because I
4 recognize the names in the document, he did not have a proxy
5 at that meeting.

6 MR. SAFER: There's one other fact, Your Honor.
7 The bylaws, although not in the record because nobody made
8 that argument, we can provide it.

9 THE COURT: I asked the question.

10 MR. SAFER: Right. The by-laws of the Chamber ILR
11 at Section 11 say, quote: "At any regular or special
12 meeting each director shall vote in person and not by proxy,
13 and shall be entitled to only one vote." So it's a great
14 question but there's the answer.

15 THE COURT: There it is.

16 MR. CANCELA: And finally, there were some
17 attorney-client privilege assertions made in the privilege
18 log. No support has been provided for those attorney-client
19 assertions, so we flagged that as well. And nothing was
20 discussed about that in any of the plaintiffs' submissions.

21 THE COURT: So I don't know -- actually, I've been
22 keeping track, but I wanted to ask you a couple questions
23 about this. So do we let you -- one of the things that
24 Mr. Blonder suggested is that it might be appropriate to
25 have some more discussion about this. The Court's view is

1 that 502, at a minimum, applies, and you must -- the
2 affidavits that have been submitted have been referenced in
3 the case, they're in the record, and they've been used, by
4 the Court's definition. They've been used. And I'm just
5 talking about plaintiffs' privilege. I'm not talking about
6 Tillery Group's. So that I believe has to be done.

7 Now, that doesn't necessarily answer some of these
8 other issues that you're talking about such as the
9 sufficiency of the log in other respects, which less time
10 has been spent on the privilege assertions, the assertion
11 that some of these are simply PR. I have not requested yet
12 the documents to be provided in camera if I'm going to have
13 to do any in camera review, I want it to be as limited as
14 possible, of course. So it might be worthwhile for the two
15 of you to discuss that and see if you can come up with an
16 idea because the Court's view of it is that that's the
17 proper analysis to undertake. It's not a complete waiver of
18 the use of that. Those affidavits are all work product.
19 But it is a waiver of some, and that's what we have to look
20 at. And then I may have to -- once there's an evaluation
21 and a meet-and-confer done, I may have to go ahead and look
22 at some more of those and decide whether I agree. We can
23 leave that open. But I'm proposing that as a way of at
24 least dealing with some of this. And you might want to --
25 that's not going to address some of the other problems that

1 you've raised, and maybe we need to go through those bit by
2 bit. Has there been further meet-and-confer since the
3 color-coding?

4 MR. CANCELA: No, no, there has not on this issue.

5 MR. BLONDER: Judge, if I could suggest -- you said
6 November 3rd, I believe, for -- I believe Mr. Cancela --
7 that's less than two weeks from today. I believe
8 Mr. Cancela and I would be in a position to go through the
9 color-coding between now and then. I mentioned earlier, and
10 we said in our briefs, we are going to be producing some of
11 the materials that are on here. Our target was October 30th
12 for that. Hoping still make that, if not a few days after
13 that, but we'd certainly be in a position to address the
14 color-coding if there are specific issues we can resolve.

15 THE COURT: And you know that has to happen. As
16 you raised, it does look to me like there's either something
17 that's not there that has to be put in there or the
18 explanation may simply be, we don't know. If mean if some
19 of these -- for instance there's no from and to. Well, this
20 might be a document that somebody created. It's not a from
21 and to, but one of the plaintiffs' lawyers created it and
22 it's sitting on their drive and anyone can have access to it
23 at the firm, for example, so that wouldn't -- if it's that
24 type of a document, that would explain. That tells you who
25 has access to it I guess.

1 MR. BLONDER: Or it could be, for example,
2 Mr. Clifford asked Mr. Wojcieszak, prepare X, and it's that
3 draft of X, in which case it's not to or from anyone. It
4 wasn't actually sent to someone; it's what Mr. Clifford
5 asked Mr. Wojcieszak to prepare.

6 THE COURT: So there's an example though of who
7 prepared it being important, so if it's one of the lawyers
8 who prepared it, that maybe doesn't need to be identified,
9 but if it's Mr. Wojcieszak who prepared it, that then goes
10 directly to the issue of, well, now we look at his affidavit
11 and other documents of his -- stick with the affidavit to
12 avoid going into other controversial areas. At the very
13 least you look at the affidavit, you say, is this something
14 that falls within the scope of the 502 waiver?

15 MR. CLIFFORD: Your Honor, may I interject
16 something here while you're on this point?

17 THE COURT: Yes.

18 MR. CLIFFORD: And that is that using Mr. Blonder's
19 last example about -- and I don't have anything specific in
20 mind, but if I had directed Doug Wojcieszak to do X, Y, and
21 Z and report back to me, we certainly maintain that my
22 mental impressions about this case or whatever it was are
23 interwoven into the comeback. I just think that's important
24 to point out here.

25 THE COURT: So if the document is prepared by

1 Wojcieszak and it doesn't say anything about the fact that,
2 *Mr. Clifford directed me to do this*, then at least if that
3 eliminates that part, what you're suggesting is that even
4 under those circumstances just the creation of the document
5 itself may suggest mental impressions.

6 MR. CLIFFORD: I absolutely believe that.

7 THE COURT: Well, that could very well be the case.
8 And then again, then it may require that I have to take a
9 look at something that they don't agree with, if you can
10 explain that. Because if it's simply a way to organize
11 something that's already been said, like, *Create me a chart*
12 *that, for example, expresses in a different form exactly*
13 *what's here*, I don't know, that might be something. That's
14 got facts in it and maybe mental impressions as well. I
15 want to be careful. I'm not saying one way or another
16 because this isn't concrete, but --

17 MR. CANCELA: So we're happy to confer with
18 plaintiffs to try to narrow the area of dispute and prevent
19 you from having an unnecessarily large in camera review.

20 THE COURT: If I've to do it, I -- you know, what
21 I've to do, I've got to do.

22 MR. CANCELA: Sure.

23 THE COURT: I'll memorialize it. But the Court's
24 view is that to the extent the evidence has been disclosed
25 voluntarily, 502(a) kicks in. We got to do that analysis.

1 One thing I've been able to resolve here.

2 MR. BLONDER: I was going through -- Mr. Cancila
3 made reference to other privileges we've asserted other than
4 work product. I just went through the color-coded log again
5 and --

6 MR. CANCELA: There's some attorney-client.

7 MR. BLONDER: I didn't see anything that said
8 "attorney-client". Everything I saw said "work product" or
9 "attorney work product", but we'll sort that out.

10 THE COURT: If it's there, it's on a very limited
11 extent. We've got time to address that.

12 MR. CANCELA: Did you have any other questions,
13 Your Honor?

14 THE COURT: No.

15 MR. CANCELA: Thank you.

16 THE COURT: So Mr. Blonder?

17 MR. BLONDER: Very briefly, Your Honor.

18 THE COURT: You get up to 15 more.

19 MR. BLONDER: I don't intend to take it unless
20 you've got a lot of questions. I'll start kind of from the
21 beginning to the end.

22 Essentially, as I heard Mr. Safer, you know, our
23 fundamental position is, we believe more than \$4 million was
24 contributed to the campaign, and the question: Do they
25 really want us to believe that Mr. Tomaszewski raised that

1 money? And the question is: Who do we really believe got
2 the Chamber to send the money back to Illinois? I mean the
3 documents we've gotten from Chamber today show the close
4 interrelationship between Mr. Rust and State Farm and the
5 Chamber. Mr. Donohue in particular, the head of the
6 Chamber.

7 You know, we talk about Mr. Murnane, the man with
8 all the connections. He was much more than a mere supporter
9 of Justice Karmeier, as I think we bore out. One e-mail in
10 particular, or document -- it's Exhibit 3 to our response
11 that Mr. Safer was talking about I want to focus on because
12 it's the e-mail from Dwight Kay [ph.]. This is -- we're
13 talking about JUSTPAC and the campaign, and it's Exhibit 3
14 filed under seal. It's a one-page e-mail that's from
15 Mr. Kay.

16 *THE COURT:* This is in?

17 *MR. BLONDER:* Our response.

18 *THE COURT:* Exhibit 3?

19 *MR. BLONDER:* Exhibit 3.

20 *THE COURT:* Thank you. I have it right here.

21 *MR. BLONDER:* It's from Mr. Kay to Mr. Tomaszewski,
22 cc'g Mr. Murnane, Justice Karmeier, and Senator Luechtefeld,
23 who was the chairman of the campaign. And in the first
24 paragraph they're talking about whoever Paul Walhausen [ph.]
25 is, and I don't know who that is, but it says, you know,

1 third line: *He also committed \$5,000 to the judge today.*
2 *He'll either send it directly to the campaign or to JUSTPAC.*

3 What they're essentially saying is a contribution
4 to JUSTPAC is a contribution to the campaign. That's to
5 Justice Karmeier, Mr. Murnane, Senator Luechtefeld, to
6 Mr. Tomaszewski from Dwight Kay. So we talk about some of
7 the interconnections. It doesn't say State Farm did that
8 but it talks about the connection between particularly
9 JUSTPAC and the campaign with Justice Karmeier specifically
10 on the e-mail. So I just wanted to kind of point that one
11 out in particular because --

12 *THE COURT:* We can all agree JUSTPAC gave his
13 campaign considerable support.

14 *MR. BLONDER:* Agreed. But in terms of the concept
15 of a contribution, the two are one in the same, at least
16 from -- it's a reasonable interpretation of that line in the
17 e-mail of money being raised for the campaign could either
18 flow through JUSTPAC or directly to the campaign. Again,
19 it's an inference ultimately for a trial in this matter or
20 for a summary judgment in this matter, but it goes to who
21 knew what and some of the interrelationships and suggestion
22 that some of the information that we may have said is
23 misleading or not there, I think when you dig deeper into
24 some of the actual documents and parse them line-by-line,
25 there's support for some of the statements. But different

1 issue.

2 THE COURT: So if you have some additional response
3 to this, you're not willing to concede that, or state, We
4 want to hold on to this equitable estoppel in case we need
5 it. I want to keep it in my pocket. We put it at issue.
6 And so their argument is, Hey, it's a very narrow category
7 of things that we want you to log.

8 MR. BLONDER: Right. And on that, Judge, again,
9 you would get there by looking at what State Farm conceded,
10 when they conceded it. Objective information within their
11 control, their abilities, their knowledge, which would go to
12 this equitable tolling issue. Again, you never even have to
13 get to the plaintiffs' side. You get to exactly what did
14 State Farm say and when.

15 Again, you know, courts talk about, when you're
16 looking about is there some kind of waiver of privilege or
17 waiver of work product, the question is: Can you get the
18 information from another means? The answer is: Here, they
19 can. They can get it from their own files.

20 THE COURT: But they want to know what you knew
21 that they can't get from their files. They want to know
22 what you knew and when. That's -- because that's where the
23 diligence inquiry comes in.

24 MR. BLONDER: And what we knew when and where in
25 this case, because of the 2011 allegation, becomes

1 irrelevant, being the second predicate act.

2 *THE COURT:* But you're not really -- but you still
3 want to hang on to it in case it's not irrelevant.

4 *MR. BLONDER:* I think that's conflating two things
5 together that don't necessarily go together, and I don't
6 even think we need to get there, the equitable tolling
7 issue, until they can show that they don't have that
8 information and they don't have the information, because
9 again, what we knew and when we knew it would become
10 irrelevant if they're still concealing it. So the issue
11 really on the fraudulent concealment -- it's fraudulent
12 concealment, equitable tolling. They go together, in Judge
13 Herndon's opinion, and he's talking about the fraudulent
14 concealment, so the issue there becomes: When did they stop
15 concealing it? Then once we establish when did they stop
16 concealing it, then the issue comes to: What did we know,
17 when, how soon did we act after that point in time?

18 Here, the first time they allege Shepherd is on the
19 executive committee is 2011. So I guess the inquiry would
20 be: Well, how soon did we act after that? Within a year
21 we'd filed a complaint. So the relevant timeframe would be
22 2011 to 2012. And there's nothing suggesting that that's
23 dilatory delay or not acting with due diligence to within
24 that year have the complaint filed ready to go. Because
25 that's actually what the inquiry would be. It's not, Hey,

1 *did plaintiffs surmise in 2004 that Bill Shepherd was the on*
2 *the ICJL executive committee, or 2002 or 2006? Again, it*
3 *doesn't matter. The issue goes to, when did they stop*
4 *concealing the information?*

5 *THE COURT:* What if there's an e-mail? What if
6 there was an e-mail from -- you know, that said, *Hey,*
7 *Wojcieszak told me that he just found out that Shepherd was*
8 *on the executive committee, and it's dated '06, that would*
9 *be irrelevant to the inquiry?*

10 *MR. BLONDER:* It would be irrelevant because
11 they -- State Farm can still be concealing the information,
12 which is the inquiry on the fraudulent concealment. When
13 did they cease concealing it? So the issue of whether the
14 plaintiffs knew it or not has no bearing on when the
15 concealment stopped. So that would be the inquiry. Again,
16 it's conflating two different things that shouldn't be
17 conflated. You only look at the diligence after the
18 disclosure was made, and I think that's a distinction that's
19 important.

20 Unless the Court has additional questions, that was
21 essentially I think what I wanted to say.

22 *THE COURT:* All right. So the rest of the issues
23 I'll take under advisement. I may have some more questions
24 in November 1. May not. So -- but other than the privilege
25 log relating to work product that the plaintiffs have and

1 whether or not certain documents have been -- or the
2 assertion should be waived or had been waived under 502,
3 there were a couple letters, three I believe that were sent
4 to the Court yesterday regarding discovery issues that are
5 ripening. Let me get those out.

6 Before we get to that, another matter. I'm mulling
7 and struggling with the issue of the sealed documents that
8 were included in the previous briefing, and whether the
9 Court can say, well, I haven't considered any of that,
10 especially in light of what we've been arguing about here
11 today. So it's likely that we're just going to have to
12 address all of those things head on, because I've looked at
13 all of it at some point, not going -- some things I've
14 looked at and decided, in the initial briefing, they weren't
15 all that important. But it's not that I didn't see it.

16 It's difficult for me to parse out what I'm
17 thinking about as I'm considering these issues we're dealing
18 with today, which raise substantive questions, so I'm
19 leaning towards -- and I'll tell you, I'm -- I think we're
20 just going to have to address everything that's been filed
21 to include what's at issue in this current round of briefing
22 and what has before and figure out a way to chew on that
23 elephant. We'll do that next time.

24 Okay. So -- and this is in response to
25 Mr. Cancila's suggestion, and I think it was a good one at

1 the time, hey, if you didn't think about it, then didn't
2 rely on it at all, no big deal, it can stay under seal. I
3 don't think I can make it that simple any more. So do we
4 want to talk about any of these issues now and figure out
5 how we want to address them? Mr. Clifford?

6 *MR. CLIFFORD:* Thank you, Your Honor. At least
7 from what I recall reading in Mr. Cancila's letter to the
8 Court, I think we're addressing most of those concerns in
9 what Mr. Blonder described about review of the privilege log
10 and the production of some documents. There certainly are
11 some other issues about production that we can include in
12 the meet-and-confer conversation that we're going to have
13 before November 3rd. We're here next on November 3rd.

14 *THE COURT:* I'm sorry, I said the 1st. That's
15 Saturday, I think.

16 *MR. CLIFFORD:* That will be a good day. We'll be
17 here if you want. So at least --

18 *THE COURT:* Day after Halloween too, so --

19 *MR. CLIFFORD:* So anyway, that's my at least
20 tentative response to anything Mr. Cancila wanted to bring
21 up.

22 Our issues, as we note in our letter, pertain to
23 some lingering State Farm issues on 30(b)(6), and then
24 actually on the bigger issue for us today, frankly, is the
25 Shepherd production or lack thereof. You know, I had a

1 conversation with Mr. Scott today and I know that his intent
2 is to try to produce some materials to us by the 15th.
3 Candidly, we were surprised to learn that they do indeed
4 have a personal computer that they've sent to a forensic
5 expert, at least as has been reported to me, and so we're
6 going to have some conversation about that. We tend to
7 believe that there's a basis for requesting that we enter
8 into a protocol on forensic examination of that computer on
9 our own, and there may have been some confusion because it's
10 very clear Russ has been relying on State Farm in many
11 respects, so there's overlap between the State Farm computer
12 and his personal computer. We're trying to work those out.

13 Wanted to tee up as an issue -- Mr. Martin is here
14 today. Wanted to tee up as an issue the discussion about
15 setting Justice Karmeier's deposition. Just looking for
16 some direction from the Court how may be best to frame that
17 issue because I know they're going to object to it. They
18 want the things we've talked about in the past. So that's
19 an issue.

20 *THE COURT:* Have we dealt with the production?

21 *MR. CLIFFORD:* No.

22 *THE COURT:* Have we established the -- because
23 there's the outstanding subpoena, much of which I think
24 there was agreement achieved on. We don't have --

25 *MR. CLIFFORD:* Mr. Cox isn't here but we actually

1 deferred it until after the election. We did reach an
2 accord on most items, as I recall, and -- but we're
3 definitely, we think, at a point where we want to establish
4 a protocol for taking Judge Karmeier's deposition after the
5 election, as we've agreed, but we want to get it on the
6 books. You know, sound like a broken record here, and I
7 apologize, but I've got my eye on that clock in terms of the
8 timeframe for discovery.

9 *THE COURT:* Well, I knew you'd made that agreement
10 previously, and so -- but what's left? So do we have to
11 deal with any more of the subpoena other than the deposition
12 itself?

13 *MR. MARTIN:* Clearly there are issues regarding the
14 telephone subpoena issues that we've exchanged some
15 correspondence on, and to our mind, that has not been
16 resolved, Judge.

17 *MR. CLIFFORD:* On that score, as far as we know, as
18 far as we're concerned, that issue, if there's an issue
19 there, it's for them to bring that to the attention of the
20 Court. There's a very clear written record between Mr. Cox
21 and Mr. Blonder about how the subpoena for records was
22 processed, how the records were handled upon receipt, how
23 whatever phone numbers were logged by us and sought by us
24 were provided by Mr. Cox, and that the phone numbers, in
25 fact, of which they complain were not phone numbers provided

1 to us by counsel for Justice Karmeier; they were in the mix
2 of all the things. We didn't even know that these phone
3 numbers were associated with Justice Karmeier, and so as far
4 as we're concerned, the issue should be rightfully over.
5 The records have been sequestered. They've not been looked
6 at. We've made affirmative, you know, representations about
7 all of that as officers of the Court, so we don't know
8 what's left on that. If they have something, let them file
9 something.

10 *MR. MARTIN:* We understood from the correspondence,
11 and maybe we misread it, that you all were going to file a
12 motion regarding it, so that's the confusion.

13 *THE COURT:* Motion for what?

14 *MR. BLONDER:* The motion that we would like to file
15 that I think Mr. Martin -- we would like to actually now go
16 look at the phone records and consider them as discovery.

17 *THE COURT:* That has not been resolved.

18 *MR. BLONDER:* That's the issue that is now on the
19 table that -- when Mr. Clifford says we want to at the next
20 hearing address the documents from Justice Karmeier, it's --
21 we want to start both getting the documents that they may
22 have agreed to produce and start looking at the ones that,
23 again, we've sequestered because it was held in abeyance.

24 *THE COURT:* Okay. And so the argument is they
25 shouldn't have to look at them at all?

1 MR. MARTIN: Certainly the telephone records. I
2 mean we have -- we sent a detailed letter to Mr. Blonder
3 including questions that we wanted to have answered, and the
4 way I read the latest letter from Mr. Blonder was that they
5 were going to file a motion with the Court, which I haven't
6 seen, so this is catching me a little bit off.

7 THE COURT: Well, we -- that's -- you know, based
8 on the way I want to handle this, we can decide first what
9 the issue is, and that's going to require some additional
10 conversation because to just file a motion and we don't know
11 what it's even going to be about, may not even require that.
12 I know we've been filing a lot of motions. They were
13 appropriate when it comes to these privilege issues, but --
14 and it may be for this too, but --

15 MR. BLONDER: The issues that at this point we want
16 to be able to look at the phone records that have been
17 sequestered and proceed with discovery of Justice Karmeier,
18 again, as it's been deferred.

19 THE COURT: All right. So when you say discovery
20 of Justice Karmeier, you're talking about his deposition?

21 MR. BLONDER: Correct.

22 MR. CLIFFORD: That's correct, Your Honor. The way
23 that we envision it, and just in fairness to Mr. Martin,
24 it's been Courtney who's been in touch with Mr. Blonder
25 mosts of the time.

1 THE COURT: Do you want to tell me on the first
2 what it is that you disagree on?

3 MR. CLIFFORD: Third.

4 THE COURT: Third. I'm sorry. Tell me on
5 November 3rd what you disagree on.

6 MR. CLIFFORD: I think that would be fair to him
7 because when he just spoke about that letter, they sent us a
8 letter that outlined things that, as far as we're concerned,
9 are moot and go to the propriety of what we may have done in
10 response to the information they gave us, and we think
11 that's past. So if they have an issue with that we think
12 they should bring it to the Court's attention.

13 THE COURT: Okay. So that's one.

14 MR. MARTIN: To answer your question, Judge.
15 November 3 would be a proper time to deal with these issues,
16 and probably before November 3 we should discuss, so there's
17 clarity on what the issues are.

18 THE COURT: Yeah. All right. Sounds good. So
19 that's two things we're talking about.

20 MR. CLIFFORD: We have another one.

21 MR. MARTIN: And just so the Court's -- I think the
22 Court's aware, we don't get these letters that -- for
23 example, that's in front of Mr. Clifford right now that the
24 parties exchange.

25 MR. CLIFFORD: You're not referenced in this

1 letter. I'll send you one if you want.

2 THE COURT: If it concerns you, you should be
3 getting it.

4 MR. CLIFFORD: And it does. Another item not
5 referenced in this letter, and Mr. Nester did receive a copy
6 of, is we did issue subpoenas to the ISBA, and there's some
7 pushback from the ISBA, and this relates to the judicial
8 evaluation process and committee that was formed to vet
9 Judges Maag and Karmeier, and we issued subpoenas, I
10 believe, for two depositions. Mr. Cancila has objected, and
11 I believe Mr. Nester is objecting, and we're probably going
12 to have to tee up for you somehow those issues because
13 there's no question, and we readily acknowledge there's some
14 qualified privilege associated with the judicial evaluation
15 process, but it's not absolute and we believe we know how to
16 ask questions to stay within the boundaries of what's
17 permissible.

18 THE COURT: I guess one page wasn't enough to
19 describe what the discovery disputes were going to be.
20 Mr. Nester -- Mr. Nester, good afternoon.

21 MR. NESTER: Good afternoon, Your Honor.

22 THE COURT: You're representing?

23 MR. NESTER: I've been retained by ISBA to
24 represent --

25 THE COURT: Do you want to come up. Thank you for

1 being here. Hope you found the last three hours
2 educational.

3 *MR. NESTER:* They've been informative, Your Honor.

4 *THE COURT:* So you've got objections regarding
5 these deposition notices. The question is: Evidently they
6 cannot be worked out informally. These issues?

7 *MR. NESTER:* Judge, what has transpired is that I
8 contacted Mr. Clifford after I was notified by ISBA that it
9 had received a subpoena duces tecum and after four of its
10 committee members who served on the judicial evaluation
11 committee received a notice of intent to schedule their
12 depositions. I've been retained to represent ISBA and two
13 of those committee members. And Mr. Clifford, after my
14 contact or communication with him, was gracious enough to
15 give me 30 days within which to have an opportunity to
16 review the pertinent or relevant records, confer with my
17 clients, pleural, and then stake out a course of action.
18 And Your Honor, I'm working on that endeavor as we speak.

19 *MR. CLIFFORD:* Can we report back to you on
20 November 3?

21 *THE COURT:* Yes. What time did I tell you all on
22 the 3rd?

23 *MR. CLIFFORD:* I have 1:00.

24 *MR. BLONDER:* I have 1:00.

25 *MR. CLIFFORD:* That's kind of a good time for those

1 of us who travel the same day.

2 THE COURT: All right. Okay. So yes, we'll talk
3 on the 3rd about that. Okay. What else?

4 MR. NESTER: Thank you, Your Honor.

5 THE COURT: Thank you. And that's not going to
6 pose a problem for that time to be here?

7 MR. NESTER: Your Honor, I should be able to attend
8 in person. Should not present a problem.

9 THE COURT: All right, great.

10 MR. CLIFFORD: The only thing I had left on my
11 rolling agenda, Your Honor, was, the Court is going to be
12 issuing an order on the amended complaint?

13 THE COURT: Yes, yes. I owe you that.

14 MR. CLIFFORD: That's all I have, sir.

15 THE COURT: All right. Anyone else?

16 MR. CANCELILA: Just quickly, Your Honor.

17 After we sent this letter to you yesterday we
18 received verifications from plaintiffs that we're looking at
19 now. The verifications were dated July of 2014 -- I can't
20 recall the specific dates -- so we did receive the
21 verifications. Just wanted you to be aware of that.

22 THE COURT: Okay.

23 MR. CANCELILA: And we're continuing to
24 meet-and-confer with plaintiffs' counsel. We did send a
25 letter of objections relative to two of the ISBA noticed

1 subpoenas, which were Robert Schultz, Barney Schultz, who's
2 in-house at State Farm now, that was one of the subpoenas;
3 and Alan Sternberg, who is a retired counsel from
4 State Farm, in-house counsel from State Farm. So we did
5 informally send objections to plaintiffs and will be able to
6 better inform Your Honor relative to those on November 3.

7 *THE COURT:* Okay. So more on that. All right.
8 And then I got a letter from Mr. Jorgensen. Is
9 Mr. Jorgensen still there?

10 *UNIDENTIFIED SPEAKER:* Your Honor, this is --

11 *THE COURT:* Hang on one second. I was hearing
12 papers shuffle before. So were you able to hear everything
13 earlier?

14 *UNIDENTIFIED SPEAKER:* I was, Your Honor.

15 *THE COURT:* Okay. I'm sorry. Can you state your
16 name for the record again.

17 *MR. BASARIA:* Yes. This is Karim Basaria. Karim,
18 K-A-R-I-M, M as in "Mary"; last name, B as in "boy",
19 A-S-A-R-I-A.

20 *THE COURT:* I'm only looking at a piece of the
21 docket sheet. Are you entered on the case?

22 *MR. BASARIA:* I am.

23 *THE COURT:* Okay. Great. All right. So you want
24 to discuss what you have in your -- in Mr. Jorgensen's
25 letter?

1 MR. BASARIA: You know, I'm actually -- I'm not
2 familiar with the letter, and I sent Mr. Jorgensen a message
3 so he can jump back on. In the letter -- I apologize that
4 I'm not able to speak to it.

5 THE COURT: Well, I'll go ahead and ask plaintiffs
6 because -- while we're waiting. They sent your request for
7 production on March 24th. They got initial disclosures.
8 There were meet-and-confers, and there has been production.

9 MR. BELLAS: Your Honor, George Bellas. That's
10 correct. We've discussed having that production completed
11 by November 15th, consistent with the other productions.

12 THE COURT: Okay. And did you talk to
13 Mr. Jorgensen about that?

14 MR. BELLAS: We spoke -- yes. No. We spoke to his
15 the attorney that left that firm.

16 MR. CLIFFORD: Scott Berliant.

17 MR. BELLAS: That was about 30 days ago.
18 Mr. Berliant is no longer with the firm.

19 THE COURT: But was he okay with that?

20 MR. BELLAS: Yes.

21 THE COURT: The 15th. It appears though that
22 Mr. Jorgensen probably wasn't aware of that agreement, so --

23 MR. BELLAS: I will contact him and work it out.

24 THE COURT: So Mr. Basaria, that was the issue
25 expressed, and Mr. Bellas is going to talk to Mr. Jorgensen

1 so you can let him know that was discussed here today.

2 MR. BASARIA: Sounds good. Thank you, Your Honor.

3 THE COURT: All right. Anything else? All right.

4 I will see you all on November 3rd. If you want to appear
5 by phone, you can. It's up to you.

6 (Court adjourned)

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9 REPORTER'S CERTIFICATE

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11 I, Laura A. Esposito, RPR, CRR, CCR(MO), Official Court
12 Reporter for the U.S. District Court, Southern District of
13 Illinois, do hereby certify that I reported in shorthand the
14 proceedings contained in the foregoing 116 pages, and that
15 the same is a full, true, correct, and complete transcript
16 from the record of proceedings in the above-entitled matter.

17 Dated this 28th day of October, 2014.

18

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20 LAURA A. ESPOSITO, RPR, CRR, CCR

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